Supreme Court, U. S.
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77-1914

IN THE

Supreme Court of the United States

October Term, 1977

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Petitioners,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN AND HUGH CAREY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

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Opinions below

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court for the Eastern District of New York without opinion on May 5, 1977. See Appendix p. 114.

The District Court issued two decisions and orders in the case. The first such decision, issued December 7, 1976 (page 60a) denied defendants' motions to dismiss and set forth that Court's view of the proper burden of proof. The second decision was issued after its hearing herein, on December 10, 1976 (page 78a).

Jurisdiction

The opinion of the Court of Appeals, which constitutes its judgment, was entered on May 5, 1977. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

Questions Presented

Did the ruling by the Court below, in affirming without opinion the ruling of the District Court, affirm an erroneous interpretation of the Civil Rights Statutes 42 USC 1983 and 1985 (3) and 28 USC 1331, which is opposite to that decreed by this Court and the other Federal Circuits? Did the ruling of the Court below require a criminal level of proof in a civil case involving elections and thus undermine the ability of citizens to gain civil remedies for the dilution of their vote caused by illegal tampering with elections?

Statutes Involved

This case involves the proper construction of 28 USC 1331 and 42 USC 1983, and 1985 (3).

Statement

This is an appeal from a judgment by the Second Circuit Court of Appeals affirming a judgment by the District Court for the Eastern District of New York dismissing the complaint herein. The complaint was filed on November 22, 1976. The District Court held a hearing on November 30, 1977 on defendants'

Motions to Dismiss, and issued a decision denying said motions on December 7, 1977. That decision set the erroneous standards of proof which are the subject of this petition. After a hearing covering December 8 and 9, the Court held the standards of proof were not met, and dismissed the case on December 10. On December 17 plaintiffs filed a notice of appeal. Argument was had before the Second Circuit on May 2, 1977. The Second Circuit affirmed the Eastern District without opinion on May 5, 1977. A fuller history of the case is contained in the Appendix pp. 1a-2a and 90a-93a.

Argument

THE DECISIONS OF THE COURTS BELOW APPLIED CRIMINAL LAW STANDARDS TO A FEDERAL CIVIL RIGHTS CASE CONCERNING A TAINTED PRESIDENTIAL ELECTION. THIS IS SUCH GROSS ERROR AND GROSSLY INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT, AS TO MERIT REVIEW AND REVERSAL BY THIS COURT.

The District Court required of the petitioners that in order to obtain *any* relief for the *proven* deprivation of their right to vote, they had to show that the various state officials charged with administering the election in question were, personally and knowingly, *involved* in the deprivation to an extent "approximating criminal activity." 69a

Thus, although the petitioners showed that their votes were diluted by the casting of hundreds of thousands of fraudulent and/or illegal ballots, they were denied injunctive or monetary relief by the Courts below. This decision abolishes the distinction between criminal and civil cases, and by throwing an impossible burden upon Civil litigants denies them any relief. As the petitioners amply demonstrated to the Court of Appeals (pp. 100a-113a) this is flatly in contradiction to this Court's holding in *Wood v. Strickland* 420 US 308 (1975) that:

> "An Act violating...constitutional rights can no more be justified by ignorance or disregard of settled, indisputable

law. . . than by the presence of actual malice. . .(defendants are) not immune if he knows, or reasonably should have known, that the actions he took. . .would violate the Constitutional rights. . ." 420 US at 321-322.

The Courts below disregarded the practice of the defendants in distributing post-card registrations in blocks of 10,000 and more to partisan political machines and, more disturbingly, to convicted felons and youth gangs.

There is always the possibility of criminal charges being lodged against the defendants and others for their massive dilution of the vote. *Anderson v. US* 417 US 211 (1974). But the criminal standard of proof may not be showable. That is, presumably, why civil rights laws, with their lower civil standard of proof, exist. *Compare* 18 USC 241 and 42 USC 1983. Additionally, even in the event of a successful criminal prosecution, the petitioners would receive no relief. And without compulsory immunity and other investigative tools quite properly reserved solely to the government, no plaintiff is likely to meet the criminal burden of proof required by the Courts below. In essence, those Courts repealed 42 USC 1983 in the area of vote-dilution. That is for Congress to do, if such a thing is to be done. The Courts should not undertake such repeal of legislation. See 105a-106a.

The impropriety of the decisions below is placed in startlingly clear perspective when one considers that this is a case involving a Presidential election. It has been held innumerable times that the free, equal, and undiluted exercise of the franchise is the bedrock upon which our entire structure of Constitutional liberty and development is erected. See *Williams v. Rhodes* 393 US 23 (1968) and its progeny. It would be an intolerable anomaly if a state legislature's good faith attempts to regulate the conduct of elections were to be subject to a strict-scrutiny test, while the reckless negligence of state officials in sabotaging the validity of those same elections were to be effectively immunized by the Courts. Cf. *American Party v. White* 415 US 767 (1974) with the results below, especially 67a-69a.

In summary, the petitioners showed in the District Court that the Presidential Election 1976 in New York was tainted. The

officials entrusted to safeguard the election not only failed to check registrations and otherwise prevent vote-dilution, but they positively invited such dilution by broadcasting registration forms by the hundreds of thousands. The forms, returned by the hundreds of thousands, were never checked or verified in any way whatsoever. The petitioner showed, using a valid statistical method, that *at least* 138,207 fraudulent votes, and perhaps as many as 306,108 fraudulent votes, were cast (p. 80a.). Yet, since no election official could be shown by the petitioners (private citizens who had but one month between the election and the dismissal of the complaint to prove their charges) to be *criminally* involved in this fraud, *no* relief was granted: no injunction against repetition of such invitations to fraud, no damages for dilution of their votes, no relief at all. The Trial Court held that the fraud was *insufficient* to move him to act (see 88a). Petitioners submit that any fraud of the size demonstrated herein taints the election and without assigning criminal blame, requires judicial intervention lest that tainted product poison the political bloodstream of this nation.

Conclusion

The petition for certiorari should be granted in order to establish the necessary distinction between the standards of proof to be met in civil cases and criminal cases arising under the Civil Rights Act of 1871.

Respectfully Submitted

Lester E. Fetell, Counsel
and David S. Heller
Attorneys for Petitioners
231 West 29th Street
New York, New York 10001

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Docket Entries

Date	Proceedings
1976	
Nov. 22	Complaint filed. Summons issued.
Nov. 23	By Costantino, J.—Order to show cause dtd 11-22-76 returnable 11-30-76 at 10 a.m. temporarily restraining defts from moving, disposing of, etc. files, records, etc. relating to conduct of the 1976 Election in the State of New York filed. (Ret 9:15 before Mishler, J. on 11-30-76).
Nov. 30	Before Mishler, Ch.J.—case called—motion argued—T.R.O. vacated as stipulated on record—defendants' motions to dismiss the complaint are submitted—hearing for a preliminary injunction adjd without date.
Dec. 1	Motion to dismiss action for failure to state a cause of action under 42 USC 1983 filed with defts' memo of law in support. (BOE of NYC).
Dec. 1	Deft Board of Elections of the City of New York (BOE of NYC) and Betty Dolen's motion to vacate temporary restraining order and annexed affidavit in opposition to a preliminary injunction filed with memo of law in support.
Dec. 1	Dft. Board of Election of the State of New York's motion to dismiss filed with memo of law in support.
Dec. 1	Plaintiffs' supplementary memo of law filed.
Dec. 1	Letter deemed as reply memo to J. Mishler from Edward Patrick and David Blabey filed. (dtd 11-30-76).
Dec. 1	Before Mishler, J.—Case called for civil cause. Motion to dismiss complaint argued. Decision reserved.
Dec. 2	Affidavit of Thomas W. Wallace in support of motion to dismiss filed.
Dec. 2	Plaintiffs' supplementary memo of law filed.

Docket Entries

Dec. 2	Notice of cross motion pursuant to Rule 12(b) FRCP ret 12-1-76 at 4:30 p.m. filed.
Dec. 8	By Mishler, J.—Memo of decision and order dtd. 12-7-76 granting the pltffs an evidentiary hearing for a preliminary injunction on 12-8-76 and that pltffs will be allowed to amend their pleadings at this hearing and denying defts motions to dismiss filed.
Dec. 8	Before Mishler, Ch.J.—Case called. Hearing ordered and begun for preliminary inj. Cont'd to 12-9-76.
Dec. 9	Before Mishler, Ch.J.—case called—hearing resumed—defendants rest—hearing concluded—decision reserved.
Dec. 10	By Mishler, Ch.J.—Memorandum of decision and order dtd 12-10-76 denying plntff's motion for a preliminary injunction and granting defts' motion to dismiss the complaint filed. Order also directs Clerk of the Court to enter judgment in favor of the defendants and against the plaintiffs dismissing the complaint.
Dec. 14	Judgment dtd 12-13-76 that the plntffs take nothing of the defts and that plntffs' motion for a preliminary injunction is denied and that defts' motion to dismiss the complaint is granted and the complaint is dismissed filed.
Dec. 17	Notice of appeal for pltffs filed. Copy to C of A.
Dec. 21	Sten. transcript dtd 12-9-76 and 12-8-76 filed.
1977	
Jan. 21	Above record certified and mailed to C OF A.
Feb. 1	Acknowledgment received from the C of A for receipt of record on appeal.

Complaint

Preliminary Statement

This is an action for declaratory and injunctive relief. This suit is authorized by 42 U.S.C. Sec. 1983, 1985 (3) and 1988, and 28 U.S.C. 1331 (a) to redress deprivations by state officials and others, acting under color of law, of rights, privileges and immunities secured by the First and Fourteenth Amendments and various federal and New York State statutes guaranteeing the right to vote and participate in the electoral process. More specifically, plaintiffs bring this action to remedy the deprivation of their right to vote and of their right to equal protection of the Laws in the General Election for President of the United States and for Electors to the Electoral College from the State of New York, on November 2, 1976. The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

Jurisdiction

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. Section 1331 (a) and 1343 (3) and (4). This suit is authorized pursuant to 42 U.S.C. 1983, 1985 (3) and 1988 to redress deprivations of plaintiffs' First and Fourteenth Amendment rights to vote and participate in elections.

Class Action Allegations

Plaintiffs bring this action as a class action under Rule 23 (b) (2) of the Federal Rules of Civil Procedure. Plaintiffs are qualified voters enrolled in the Republican, Labor and Conservative Parties of the State of New York who on November 2, 1976 cast their ballots for Gerald Ford or Lyndon LaRouche for President of the United States and for the Presidential Electors for Gerald Ford and Lyndon LaRouche from the State of New York. Plaintiffs bring this action on behalf of themselves as representatives of all other qualified voters enrolled in the State of New York who, in the Presidential Election on November 2, 1976, were denied the right to vote in said Election or whose votes for Gerald Ford or Lyndon LaRouche were improperly counted, debased and

diluted as a consequence of the acts and practices hereinafter set out.

The manner in which the defendants conducted and affected the aforesaid Election violated rights secured to all members of the class by the Constitution and Laws of the United States, on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. The claims of the plaintiffs are typical of the claims of the class and it can be expected that the plaintiffs and their attorneys will prosecute the case diligently and will adequately and fairly protect the interests of said class.

There are questions of law and fact common to all members of the class; that is, whether plaintiffs' right to vote in a federal action have been denied or diluted and whether, in vindication of said wrongs, the aforesaid General Election should be vacated and set aside and a new Presidential Election for the State of New York ordered. The total number of persons in said class is approximately three million persons and joinder of all members of the class is therefore impossible.

Parties

1. Plaintiffs, WARREN DONOHUE, SANDRA WEISSMAN, VALDA BROMWELL and ROY G. VANASCO are members of the Republican Party who cast their vote for Gerald Ford in the November 2, 1976 election for President.

2. Plaintiffs, JOHN T. STEWART and NICHOLAS A. LONGO are members of the Conservative Party who cast their vote for Gerald Ford in the November 2, 1976 election for President.

3. Plaintiff LYNDON LA ROUCHE was the candidate of the Labor Party for President in the 1976 New York Presidential election.

4. The Rockland County Conservative Party and the Labor Party are political organizations and associations existing by and under the laws of the State of New York.

5. In addition, plaintiff JOHN T. STEWART is the Chairman of the Rockland County Conservative Party;

Plaintiff NICHOLAS A. LONGO is the Treasurer of the Rockland County Conservative Party and Plaintiff ROY G. VANASCO is the Republican Party District Leader, New York City Election District 57 and candidate for New York State Assembly in the November 2, 1976 election.

6. Defendant Board of Elections of the State of New York, at all times herein mentioned, was and is the entity charged under the Election Law of the State of New York with the duty and responsibility to conduct the Election for President of the United States in the State of New York.

7. Defendant Board of Elections of the City of New York, at all times herein mentioned, was and is the entity charged under the Election Law of the City of New York to conduct the Election for President of the United States in the City of New York.

8. Defendant Secretary of State of New York is empowered by the laws of the State of New York to certify electors from the State of New York to the Electoral College.

9. Defendant Hugh Carey, at all times herein mentioned, was and is the Governor of the State of New York and is charged with the responsibility of signing the Certification for electors to the Electoral College from the State of New York.

10. Defendant Betty Dolen, at all times herein mentioned, was and is the Director of the Board of Elections of the City of New York and is charged by law to conduct General Elections as set forth in the New York Election Law.

Allegations

1. On November 2, 1976, pursuant to its duties and responsibilities, defendants conducted a General Election for the office of President of the United States for the State of New York. The two candidates receiving the greatest number of votes in said general election were Gerald Ford and James Carter.

2. Prior to said General Election, defendants were obligated and required by law to:

a. Provide, maintain and prepare voting machines and appoint custodians of said voting machines;

b. Appoint election officers, including inspectors, from each of the two parties represented on the Board of Elections, and insure that these officers were properly trained and qualified;

c. Create, maintain and conduct a system of registration of qualified residents, potential voters, in the State of New York.

3. In the conduct of these duties, defendants failed and refused to insure and on information and belief intentionally failed and refused to insure that all unqualified voters would be prevented from voting and that all qualified voters would be afforded the opportunity to cast ballots for the candidates of their choice, by the following acts and ommissions.

4. During 1976, prior to the November 2, 1976 elections, defendants put into effect and conducted a state-wide system of registration of new voters by use of "post card" affidavit registrations, and proceeded to register hundreds of thousands of "new" voters via "post-card" affidavits. Defendants failed to properly supervise the processing and verification of these new voters, resulting in the following irregularities and unlawful practices:

a. Approximately one-half of the nearly 600,000 new "post-card" registrants in the City of New York were not properly processed or verified in any way whatsoever with respect to qualifications. Proper processing involved transmitting all incoming "post-card" registrants to a computer list. Approximately 280,000 such registrations were not transmitted to the computer prior to the said election, and were not properly verified thereafter.

b. Thousands of individuals registered two or more times. A review of the existing partial computer lists of newly registered voters demonstrates that these multiple registrants were not eliminated from the voter rolls and thus could vote twice or more times.

c. Numerous false or fictitious individuals fraudulently registered from wrong or non-existent residences, vacant buildings, warehouses, etc. A review of the existing partial computer lists of newly registered "voters" at wrong or

fictitious addresses demonstrates that such registrants could vote in the said election.

d. A review of the buff cards used in the said election indicates that such fictitious, fraudulent voters did vote in the said election. Tens or hundreds of thousands of additional such irregularities could not be determined because the names were not printed as alleged in Paragraph 4a.

e. Although registration is legally required to occur in a nonpartisan atmosphere, and through nonpartisan procedures, the recent registrations of "post-card" registrants involved numerous partisan groups, organizations and individuals, all to the detriment of plaintiffs, and the deprivation of plaintiffs' rights, as follows:

1. Ramon Velez, democratic supporter of candidate James Carter, caused to be registered approximately 20,000 new voters, of whom the overwhelming percentage were supporters of James Carter.

2. Percy Sutton and Charles Rangel, democratic supporters of James Carter, caused to be registered tens of thousands of new voters, of whom the overwhelming percentage were supporters of James Carter.

3. Victor Gotbaum and Lilian Roberts, in their positions as officials of AFSCME, and as Democratic supporters of James Carter, caused to be registered tens of thousands of new voters, of whom the overwhelming percentage were supporters of James Carter.

4. Arthur Eve, Democratic State Assemblyman from Erie County, New York State, caused to be registered ten to fifteen thousand new voters, of whom the overwhelming percentage were supporters of James Carter.

f. With respect to the individuals and acts stated in Paragraph 4(e) (1) — (4), supra, in almost all cases members and officials of the Board of Elections of New York State and New York City met with, planned and cooperated with said individuals in their attempts to register new voters, despite the fact that these individuals were supporters and campaigners for James Carter. Each and all of these individuals utilized registration procedures calculated and

intended to register non-existent or unqualified Carter voters, all to the knowledge of defendants.

g. On or about October 14, 1976, prior to the November 2, 1976 elections, the Board of Elections of the City of New York forwarded to the Elections Boards for Brooklyn, Queens and Bronx approximately 60,000 new postcard registration applicants, and ordered that these registrants be allowed to vote in the said election, despite the fact that said registrants could not be properly processed and-or verified and validated. The majority of these registrations had been gathered in August and September and were withheld from the said Election Boards until the last minute to prevent proper validation.

h. The New York City Board of Elections extended the time limit for acceptance of mailed-in postcard registrations to October 8, 1976. Article 7, Section 153, No. 3 specifies that completed applications must be received not later than the thirtieth day before the next following general or special election. October 2nd was the final legal day for accepting such registrations, according to the Election Law standards.

i. Immediately prior to the said election, defendant Betty Dolen spoke numerous times on radio and television and stated publicly that all individuals should appear at the polls and vote, and that no one would be turned away. Defendant Dolen failed to mention that numerous individuals were unqualified to vote and that such individuals would not be legally qualified to vote. This encouraged numerous illegal and invalid voters to appear at the polls on Election Day. As discussed infra, the large overflow at the polls on Election Day created a situation of confusion and chaos in which numerous illegal practices occurred, and in which numerous illegal and invalid "voters" were permitted to enter the voting machines and cast a ballot.

j. Immediately prior to the said election, defendant Betty Dolen met with the election officials for the said election and instructed them not to turn away anyone who appeared at the polling place and requested to vote, despite the lack of qualifications of such a voter.

5. In the Spring of 1976, members of the Republican Party from the State of New York filed a lawsuit in New York State Supreme Court and requested an order declaring the law permitting registration by postcard to be unconstitutional. The New York Courts upheld the validity of registration by postcard. However, the Law, as upheld, was systematically violated in every particular resulting in the improper registration of tens of thousands of individuals, as stated supra. Plaintiffs herein therefore have no other relief but to ask for an order calling for a new election.

6. Defendants failed to provide adequate voting facilities and personnel in substantial numbers of election districts, thereby permitting numerous irregularities and illegal acts to occur. More specifically:

a. Numerous polling places were overcrowded with individuals seeking to vote, and there existed a situation of chaos and confusion, which led to the following illegal acts.

b. Approximately fifty thousand individuals entered the polls and voted on a paper affidavit ballot, due to the fact that there was no official buff card for such individuals. Approximately 80 to 90 percent of such votes have since been determined to be improper and invalid. The presence and ad hoc processing and voting of such individuals at the polling places during the said election greatly increased the chaos and confusion at the polling places.

c. In numerous polling places, electioneering occurred, although such acts are not legally permitted.

d. There were numerous instances in which individuals entered the polling places and illegally voted at least twice. Such illegal acts were carried out through several methods, but all such acts resulted from the chaos and confusion at most polling places.

e. There were numerous instances in which voters were subjected to force and threats at the polling places. Such illegal acts both resulted from, and added to the chaos and confusion at polling places.

f. Numerous fraudulent and improper voters, improperly registered via postcard affidavits, were permitted

to vote. Such individuals have been shown to live at wrong or non-existent addresses.

g. Numerous mentally incompetent and otherwise illegal individuals, such as convicted, were permitted to register and vote. Further, numerous such mentally incompetent individuals, and elderly people, and individuals who did not speak English were permitted to enter the voting machines with another person who actually voted for that person. In several such instances, the "friend" reappeared with several such people and voted many times.

h. Post-election inspection of the buff cards used in the said election revealed forged signatures on the buff cards; that is, an illegitimate person signed a buff card and voted for a legitimately registered person. Further, in some instances, a different person with a different name signed a wrong buff card and was permitted to vote, without the detection and correction by the election officials.

i. In numerous instances Democratic election officials at the polling places did not properly rotate positions in the polling places. Further, at many polling places, the Democratic election officials processed all the new registrants.

j. In numerous polling places, Democratic election officials improperly assisted voters by entering the machines, choosing candidates and pulling the levers.

k. Many poll watchers were not permitted to inspect machines and otherwise review and correct the ongoing election process.

7. A review of the election results, as recorded and reported by the Board of Elections after the said election demonstrates numerous irregularities and statistically improbable results, including the following:

a. On almost all voting machines employed in the said election, the total body count registered on the machine was a larger number than the number of signed buff cards of legal voters who could have legally voted on such machines.

b. On almost all voting machines inspected the total vote cast for the office of President falls far short of the total body count registered on the machine. Such an occurrence on any

machine is rare and should only occur on a few machines in any election.

c. A comparison of the results of the instant election with the Presidential election results for the preceeding, 1972 Presidential election indicates that the vote for the Democratic candidate stayed roughly the same, at 1,800,000 voters, while the Republican vote dropped from 1,300,000 votes in 1972 to approximately 650,000 votes in 1976. Such a result is highly statistically improbable and presents statistically valid evidence of highly irregular practices.

d. The votes for a third party presidential candidate, the U.S. Labor Party Presidential candidate Lyndon H. LaRouche, also a presidential candidate in the said election, indicates a vote pattern in which low, equivalent vote totals were obtained in all election districts throughout the City of New York, despite extreme differences of voter penetration and recognition in different election districts. Such results are highly improbable, statistically significant, and indicate prima facie evidence of irregularities with respect to the voting machines which counted the presidential vote, or irregularities resulting from the counting of the votes after the election. Moreover, in several precincts, more people have signed affidavits that they voted for LaRouche than votes were recorded.

8. On the basis of the foregoing, plaintiffs are informed and specifically believe, and on that basis allege, that certain aspects of the election process and the tally of votes thereafter were fraudulently, purposely and corruptly conducted and that defendants condoned, permitted, acquiesced in, and approved said fraudulent election.

9. As a proximate and foreseeable consequence of the acts set out in Paragraphs 4 through 8 the tabulated results of the said election were inaccurate and misstated the results of the election.

10. The purpose and effect of said acts set out in Paragraphs 4 through 8 herein was to discriminate against candidate Gerald Ford and those voters who cast ballots or desired to cast ballots in his favor thereby depriving said

voters of the equal protection and due process of law and the right to vote guaranteed under the Constitutional provisions heretofore set out.

11. Plaintiffs have no plain, adequate or complete remedy at law to redress these wrongs in that these wrongs are not compensable in monetary damages. This suit for injunction is the only means for securing adequate relief and unless remedied plaintiffs will continue to suffer irreparable injury from defendants' conduct as herein set forth.

12. Plaintiffs expended approximately $2,000,000.00 in the Presidential campaign in New York State the use of which money was wrongfully taken from them by defendants' acts as herein alleged.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court enter a judgment:

1. Adjudging the aforesaid Presidential election to have been conducted in violation of the United States Constitution and therefore said election to be null and void.

2. Directing defendant State Board of Elections to conduct a new Presidential Election for the State of New York.

3. Enjoin defendants from representing and holding James Carter as the Presidential nominee for aforesaid office, from the State of New York, or from certifying any slate of Electors pledged to James Carter as valid Electors from the State of New York.

4. Granting such other and further relief as this Court may deem just and proper.

5. Damages in the amount of $2,000,000.00.

6. Plaintiffs' costs and attorneys' fees incurred in bringing this action.

Dated: New York City, New York
November 22, 1976

Respectfully submitted,
DAVID L. HELLER
CARREN C. KLEINMAN
WILLIAM F. WRAY, JR.
DAVID MAC RAE WAGNER
ALAN TABAKMAN

Attorney's Affirmation

State of New York
County of Rockland ss.:

DAVID MAC RAE WAGNER, an attorney at law, admitted to practice in the Federal Courts of the Eastern District of

New York, deposes and swears as follows under penalties of perjury:

1. Deponent is an attorney at law and one of the attorneys of record for the Plaintiffs herein.

2. Because of the geographical diversity of the Plaintiffs and the time strictures placed upon the Plaintiffs by the New York Election Law, deponent verifies the Complaint herein.

3. Deponent knows all the matters contained herein to be true except those alleged to be upon information and belief and to those deponent believes them to be true.

Dated: New York City, New York
November 22, 1976

DAVID MAC RAE WAGNER

INGER K. I. WARREN
Notary Public, State of N.Y.
44-4606400
Qualified in Rockland County
Commission Expires March 30, 1977

Defendant's Motion to Dismiss

Sirs:

PLEASE TAKE NOTICE upon the annexed affidavit of A. Seth Greenwald, sworn to December 1, 1976, the undersigned will move this Court, in Courtroom 5, 225 Cadman Plaza East, Brooklyn, New York 11201, on the 1st day of December, 1976, 4:30 p.m. pursuant to F.R.C.R. 12(b) upon the grounds that the complaint fails to state a cause of action and is not within the subject matter jurisdiction of the federal court and for such other and further relief as may be just and proper.

Dated: New York, New York
December 1, 1976

Yours, etc.,

LOUIS J: LEFKOWITZ
Attorney General of the
State of New York
Attorney for Hugh Carey
and Secretary of State of
New York

By

A. SETH GREENWALD
Assistant Attorney General
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3396

Defendant's Motion to Dismiss

TO: DAVID M. WAGNER
11 Stokum Lane
New City, New York

DAVID BLABEY
Special Counsel
State Board of Elections

W. BERNARD RICHARD
Corporation Counsel
City of New York

Defendant's Motion to Dismiss

Defendant New York State Board of Elections moves that the court dismiss the action for lack of jurisdiction over the person of the defendant New York State Board of Elections and for failure to join persons needed for a just adjudication of the action and for failure to state a claim upon which relief may be granted.

DAVID E. BLABEY
EDWARD R. PATRICH
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New York State Board of Elections
2 World Trade Center
New York, New York 10047
(212) 488-6098

Defendant's Motion to Dismiss

Defendants Board of Elections of the City of New York and Betty Doken move the court to dismiss the above-captioned action on the ground that plaintiffs fail to state a cause of action under 42 U.S.C. 1983. as more fully appears from the annexed affedavit and memorandum of law of MARK L. SCHWARTZ, Esq.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for City Defendants
Municipal Building
New York, N.Y. 10007

By MARK L. SCHWARTZ

Defendant's Motion to Dismiss

Defendants Board of Elections of the City of New York and Betty Dolen move the court to vacate the temporary restraining order entered herein without notice to defendants on November 22, 1976 on the grounds that the plaintiff's attorney failed to certify to the court his efforts, if any, to give notice to the defendants, or their attorney and the reasons why notice should not be required and secondly, the issuance of a temporary restraining order and-or a preliminary injunction is not necessary for the prevention of irreparable injury to the plaintiffs, as more fully appears from the affidavits of Mark L. Schwartz and Betty Dolen attached hereto.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for City Defendants
Municipal Building
New York, N.Y. 10007

By MARK L. SCHWARTZ

Plaintiff's Opposition to Motion to Dismiss

PLAINTIFFS' SUPPLEMENTARY MEMORANDUM OF LAW

Limitations of time obviously limit the scope of reply available to plaintiffs. In brief, the points raised by the various defendants may be rebutted as follows.

1. The Motion of defendants Board of Elections and Betty Doken (sic) relies on *Phillips v. Rockefeller*, 321 F. Supp 511, affd 435 F.2d 976, (2 Cir 1970). That case concerned itself with whether a Senatorial candidate who received less than a majority of the votes could take his seat. The defendants rely on dicta. The Second Circuit wrote:

> "Since we find this case so clear on its merits, we do not reach the procedural and jurisdictional points relied on by the District Court..."

and,

> "The *sole* question which we find necessary to reach in this case is whether the language of the 17th Amendment to the United States Constitution.... requires that a candidate... receives a majority of the votes." (emphasis added).

Thus, the defendants rely not only on lower-court dicta, but rejected dicta at that.

That Elections are state, and not federal functions cannot be clearer. U.S. Constitution, Art. II, sec. 1, clause 2. Old cases and new are unanimous on this point especially in the context of Presidential elections.

> "Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are members of the State legislatures... Constitution Art. 1, sects. 2.3." *In Re Green*, 134 U.S. 377, 379 (1890).

and,

> "Under the Constitution the President is not chosen directly by the citizens, but by the electoral colleges in the States... the whole thrust of this is that the Constitution does not, by its terms, grant *citizens* the right to

> vote, but leaves the matter entirely to the *States*." *Sanchez v. U.S.*, 376 F. Supp 239, 241 (D.P.R. 1974). (emphasis in original).

See also *Williams v. Virginia State Board of Elections*, 288 F. Supp 622, 624-25 (1968); *U.S. v. Buch*, 98 F. Supp 313, aff'd 93 F. 2d 383, cert den. 303 U.S. 644, reh den. 303 U.S. 688 (1937).

The Constitution is itself plain enough on this point.

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which may be entitled in the Congress..." Art. 11, sec. 1, cl. 20

Reliance on dicta in a case not concerning fraud, nor Presidential electors, and rejected on appeal in relevant part, is hardly a convincing argument. Of course, even where color of state law is *not* present, such is not required under 42 U.S.C. 1985 (3), a separate basis of jurisdiction herein. *Griffen v. Breckenridge*, 403 U.S. 88 (1972).

2. The Board of Elections seeks to evade its responsibility on grounds of technical joinder. The simple reply is that if there are necessary parties non-joined, plaintiffs will serve them at once in whatever manner as this Court may direct. No reason is advanced why non-joinder of parties should aid in the evasion of substantive matters. Morever, the Board itself, while immune to suit under 42 U.S.C. 1983, is liable under the general federal question jurisdiction 28 U.S.C. 1331 (a), as matters arising directly out of the United States Constitution. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1969). Tens of cases have held that constitutional violations not cognizable under Sec. 1983 are properly before the Court under 1331(a) provided the jurisdictional amount is pled. See *Lehner v. O'Rourke*, 339 F.Supp 309 (S.D.NY 1971) dicta as well as the numerous progeny of *Bivens*. *1.*

3. Finally, the various arguments with regard to preliminary relief are moot, given that defendants' cosmetic concerns have been satisfied by plaintiffs' stipulation. Should this case come on for an evidentiary hearing, even early next week, no disruption of the normal process of the electoral

college need occur, since this Court may hear the evidence and decide on the propriety of permanent injunctive relief at that time.

Collaterally, according to the New York Times of November 4, 1976, p. 34, the alleged margin in New York State was 250,327, not 280,000 as stated in Court. And, as alleged in Para. 9 of the Complaint, it *is* alleged that the results of this election would be reversed were the fraudulent votes excised.

Conclusion

Defendants' Motions ought to be denied and a full evidentiary hearing ordered.

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One of the Attorneys for
Plaintiffs

1 Particulary relevant are: *Aptar v. Wilson*, 506 F.2d 83 (1974); and *Maruso v. District of Columbia*, 484 F.2d 828.

Other cases among the vast majority holding that *Bivens* applies to the Constitution generally are: *States Marine v. Shultz*, 498 F.2d 1146, (4th Cir., 1974), (Fifth Amendment); *Johnson v. Alldridge*, 349 F.Supp 1230 (M.D. Pa. 1972) aff'd in relevant part 488 F.2d 820 (3rd. Cir., 1973); *Washington v. Brantley*, 352 F.Supp. 559 (M.D.Fla., 1972); *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir., 1975): *Howard v. Warden*, 348 F. Supp 1204, 1205 (E.D. Va., 1972).

Other courts have overwhelmingly ruled that *Bivens* covers any violation of Constitutional rights by federal officers. Merely illustrative of these cases are the following:

Cox v. Stanton, 529 F.2d 47, (4th Cir., 1975), (13th and 14th Amendments); *Brault v. Milton*, (527 F2d 730,732 (2nd Cir.,

Plaintiff's Opposition to
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1975) (14th Amendment); *Dry Creek Lodge v. U.S.*, 515 F.2d 926, 932 and n. 5 (10th Cir., 1975) (Fifth Amendment); *Sullivan v. Murphy*, 478 F.2d 938,965 and n. 47 (D.C.C., 1973) (Fourth and Fifth Amendments), cert den 414 U.S. 880; *Braden v. University of Pittsburgh*, 477 F.2d 1, 7 n. 10 (3rd. Cir., 1973) (14th Amendment — dictum); *Reus v. Laird*, 391 F.Supp 1133, 1139, (E.D. Pa., 1975) (First and Fourteenth Amendments); *Brown v. Board of Education*, 386 F.Supp 110, 121-22 and n. 5 (N.D.Ill., 1974) (14th Amendment); *Shaffer v. Wilson*, 383 F.Supp 554 (Colo., 1974), (Fourth and Fifth Amendments); *Dahl v. Palo Alto*, 372 F.Supp 647 (N.D. Cal., 1974) (Fifth Amendment); *Perzanouski v. Salvio* 369 F.Supp 223,224 (D.Conn. 1974) (14th Amendment); *Bulter v. U.S.*, 365 F.Supp 1035 (D.Haw., 1973) (First, Fourth and Fifth Amendments); *Dupree v. Chattanooga* 362 F.Supp 1136,1139 (E.D.Tenn., 1973) (14th Amendment); *Covington v. Cole*, 528 F.2d 1365,1320 (5th Cir., 1976) (Fourth Amendment); *Alliance to End Repression v. Rochford*, 407 F.Supp 115, (N.D. Ill., 1975) (First, Fourth, Eighth Amendments); *Lombard v. Board of Education*, 407 F.Supp 1166 (E.D.NY, 1976) (14th Amendment); *Panzarella v. Boyle*, 406 F.Supp 787 (D.RI, 1975) (14th Amendment); *NCLC v. Banks*, 75 Civ. 1536, D.C.NJ. (First and Fourth Amendments); and *Rauch v. United Instruments*, 405 F.Supp 442 (E.D. Pa. 1975 (Civil Aeronautics Board).

Order to Show Cause
For Temporary Restraining Order

Upon reading a copy of the Verified Complaint herein and the supporting affidavits thereto, and the parties having been heard, it is hereby

ORDERED that defendants, their agents, servants, employees, and all others acting in privity or concert with them be, and hereby are temporarily restrained from disposing of, relinquishing possession of (except to this Court), or in any manner altering, moving, destroying, defacing, mutilating or rendering illegilbe the files, records, data, instructions, directions, manuals, cards or the like comprising or relating to conduct of the 1976 Election in the State of New York, and it is further

ORDERED that the defendants herein be temporarily restrained from representing and holding James Carter as the Presidential nominee from the State of New York or from certifying any slate of Electors pledged to James Carter as valid elector from the State of New York and it is further

ORDERED that defendants show cause at a hearing to be had in the Eastern District of New York on the 30th day of November, 1976, why this order should not be issued as a preliminary injunction herein and it is further

ORDERED that personal service of this order and supporting papers upon defendants or their attorneys or their official representatives in New York City by 4 p.m. on November 24, 1976, shall be good service.

Dated: New York, New York
November 22, 1976.

signed Mark A. Constantino
U.S.D.J.

Excerpts from Transcript

Direct Examination by Mr. Fetell:

Q. Ms. Dolen— A. Yes.

Q. By whom are you employed? A. The Board of Elections.

Q. Which Board of Elections? A. The Board of Elections in the City of New York.

Q. What is your title? A. Executive Director.

Q. How long have you been employed by the Board of Elections? A. 15 years.

Q. How long have you held your p-esent title? A. Two years.

Q. What did you do before that? A. I was Senior Administrator, before that an Administrative Associate and an Administrative Assistant.

Q. Are you working full time? A. Oh, yes.

Q. Are you the senior staff member of the Board of Elections in contradistinction to those who may hold honorable titles or part-time positions? A. Yes, I am.

Q. And are there numerous district Boards under your jurisdiction? A. The five-borough offices and the general office.

Q. So that there is a total of six offices, yours plus the five boroughs? A. Yes, plus the five boroughs and mine.

Q. And you have personal knowledge of the new mail registration system, don't you? A. Yes.

Q. When did you first become oriented to the provisions of the new mail registration system? A. The law was enacted in June of 1975 to be effective as of December 1, 1975. I had met with the members of the State Board of Elections, with the Commissioners of the Board of Elections of New York City and with many representatives of community groups, the League of Women Voters, and we had many conferences as to the regulations of registration by mail.

Q. I take it, then, you were personally familiar with the statutes, and more importantly its implementation? A. That is right.

Q. And were you charged by the State of New York to administer that program in the City of New York? A. Together with the Commissioners of the Board of Elections, right.

Excerpts from Transcript

Q. But you said that the Commissioners are part time, they don't work full time; is that correct? A. Well, they set policy and I follow it.

Q. I see.Now—

The Court: How is the statute implemented, were there rules and regulations promulgated?

The Witness: Not really. The main thing when the law had been enacted was to get a form—it isn't really a postcard, it is a registration-by-mail sheet and we met, we were seated with the State Board of Elections and with the members of other boards of elections throughout the State of New York and this form finally was compiled.

By Mr. Fetell:

Q. What is the form?

(The witness indicated a document.)

The Court: Is it the form that you are holding?

A. This is an application for registration-by-mail.

Q. I see.

Mr. Fetell: May I have that marked for identification, your Honor?

The Court: Any objection to marking it in evidence?

Mr. Schwartz: No.

The Clerk: So marked as Plaintiffs' Exhibit 44 in Evidence.

Mr. Fetell: Do you have an extra copy so I don't have to look at yours?

Do you have an extra copy?

The Witness: Not with me.

Mr. Schwartz: I believe this is one.

Is this the one, in Spanish or English?

Mr. Fetell: I will read it in either lanugage.

The Clerk: May I mark it, please?

The Witness: Incidentally, one of the rules promulgaged was that it may be printed in English and in Spanish.

Mr. Fetell: Does your Honor want to look at it?

The Court: I think I saw the xeroxed copy of some so I have some idea of what it is.

Q. Let us go to that for the moment. When you say it was both printed in English and Spanish, was this a requirement that one form be bi-lingual? A. The State of New York has to print everything bi-lingually pertaining to elections matters.

Q. Well, the one you have shown us— A. I think it is in Spanish.

Q. That is my question, is it the same form, is it the same piece of paper, is it a bi-lingual document or must one get one in English and one in Spanish? A. I have a form printed in English and a form printed in Spanish.

Q. And what provisions were made for the proper distribution of these—

Mr. Schwartz: Your Honor, I object.

The scope of this hearing, I suggest, is broad enough now without going into every aspect.

The Court: What is the purpose of this inquiry?

Mr. Fetell: Because we are attempting here, your Honor, to make an offer of proof that the irregularities that we are discussing and which culminated in the election, started right from the inception of the voter registration, and the voter registration was part and parcel of what culminated and that there is a complete chain leading from it.

The Court: Go ahead.

The Witness: Will you repeat your question, please?

Q. What provision, if any, did you make for a balanced distribution of these forms in English and Spanish so you wouldn't send too many, let us say, Spanish forms to the English area or too many English forms to the Spanish area? A. I didn't send them out to anyone unless I was requested to. People came up representing community groups. They asked for X number in English and X number in Spanish. The statute provides that no one was to be denied applications within a reasonable amount.

Q. Did you take part in any publicity drives in connection with voter registration in your official capacity? A. No.

Q. Were you ever interviewed on the radio or television or newspaper or other media in your official capacity in order to describe the new provisions that come into effect? A. Well, I was a part of a major program of registration, whenever there was a drive, but the Board of Elections, per se, did not go out on street corners and hand out these forms.

Q. I didn't ask you about that, what I asked you was were you ever on the radio or television or did you give interviews to any of the media in which you in your official capacity was asked questions in that public forum whereby you assisted and encouraged voter registration? A. Yes.

Q. All right. And in what form, radio or television or other media? A. All media

Q. On how many occasions? A. Numerous occasions, from the very inception.

Q. And was it—

The Court: What do you mean, all media, are you including the press?

The Witness: The newspapers.

The Court: Press releases in all languages?

The Witness: Well, we sent press releases to all newspapers and to all radio stations.

Q. I am not talking about you personally, I'm talking about you in your official capacity, did you have radio or television exposure in your official capacity? A. Yes.

Q. On how many occasions? A. In what period?

Mr. Schwartz: Your Honor, if we may, the hearing has up until this point been in the form of witness narration, and if Counsel wants to know about this publicity program or whatever, or however he wants to characterize it, I think he ought to let the witness explain.

The Court: I will allow the examiner to ask the questions in his own way.

Q. From the beginning of the new system of postcard registration up until November 2nd? A. Well, every time I

was asked by radio or television, how many times I was asked?

Q. Yes. A. I would give an educated guess of fifteen times.

Q. Was it the stated policy of the commissioners of the Board of Elections of the City of New York for the Board to encourage increased voter registration? A. Well, naturally, it is the duty of the Board to—

Q. Is your answer yes or no? A. Yes.

Q. When you say that the Commission made policy—that was one of the state policies in 1976; is that correct? A. What?

Q. To encourage increased voting registration. A. Yes.

Q. When you appeared on radio or television, approximately fifteen times, you were implementing that state policy of encouraging increased registration? A. I explained the process of registering by mail.

Q. Was it part of what you were doing, implementation of the Commissioner's stated policies of encouraging and increasing voter registration? A. Yes.

Q. Was your material ad libbed, or were there written statements prepared by somebody to be read by you? A. I didn't have written statements.

Q. Did you ever indicate in words or substance that voters were encouraged to come out and vote? A. Always.

Q. Now, how long has the system of voting on (a) affidavits been in effect? A. 1974.

Q. Was there any appreciable increase—Withdrawn. Have there been any elections prior to 1976 election in which A cards— A. It was effective immediately, so we had affidavit ballots in the general election of 1974, in the primaries of 1975, and the general election and the two primaries of 1976 and the general election of 1976.

Q. Mrs. Dolen, was there any appreciable increase in the number of A ballots that were cast in the November '76 election? A. Yes.

Q. As distinguished from the prior— A. Yes.

Q. Can you give the Court some indication of the number or

percentage of the amount of increase? A. In 1974, the apathy of the people was very strong. Not too many people came out to vote. And naturally the requests for affidavit ballots would be less. In 1975 it was what we call an off year, and there weren't many at that time. 1976 was a Presidential election, and I would suspect that the amount of the A ballots would be comparable to the importance of the election.

Q. Do you know how many A ballots were cast in Kings County in the November election? A. I know—no, not by borough. I have a total.

Q. What is the figure? A. The total for the entire City was approximately 50,000.

Q. How many were thrown out? A. They weren't thrown out.

Q. Rejected. A. 40,000 were not counted.

Q. Forty? A. 40,000.

Q. On what basis were they not counted' A. Their application may have come in beyond October 4th, in person they probably had never re-registered after their registration had been canceled. Some people moved and they were mistaken with the word "permanent." They thought they were permanently registered. There are various reasons and the reasons are set forth on the outside of the envelope.

Q. Out of 50,000—We understand what you are saying—50,000 A ballots means 50,000 people who showed up at a polling place? A. No.

Q. 50,000 showed up— A. At 4,800 polling places.

Q. At all of the polling places, and when they got there, there was no buffer card for them; is that correct? A. That is right.

Q. Of those 50,000 people who showed up, 40,000 people were not entitled to vote for reasons other than the absence of a buffer card; they simply were not registered and eligible voters; is that correct? A. Right

Q. Now, when the new statute—that is, Section 153 of the election— A. Yes.

Q. —153 of the election law was added by the Laws of the 1975 New York State Legislature; is that correct? A. Yes.

Mr. Schwartz: Counsel, you have the book in front of you. I don't see the purpose of this interrogation.

The Court: I will allow it.

Q. When, Mrs. Dolen, for the first time, did you receive a copy—Withdrawn. Did you receive a copy of this legislation before its legal effective date? A. Yes.

Q. How long before? A. I knew that regulation, by mail, was being legislated. I don't recall exactly when before.

Q. We're dealing with days or months. A. Several months.

Q. From that time, did you or anyone on your behalf or under your supervision prepare any rules or regulations or instructions with regard to the implementation of this document? A. It wasn't necessary.

Q. The answer is no? A. No.

Q. Did the Commissioner discuss with you the personal requirements that you anticipated with respect to implementing it? A. Yes.

Q. Were provisions made for additional budgeting for more employees? A. Through the office of the Mayor and the Director of the Budget.

Q. How many additional employees did you get to process the influx of cards? A. We started with about a hundred, and when the influx became very great we ended up with an additional two hundred.

Q. Where did you get the employees from? A. From the county organizations.

Q. Came out of the clubs? A. From the county organizations.

Q. Let's get the record clear. A. I don't know where they came from.

Q. What is the county organization? A. A democratic county organization. Two organizations of the two highest votes at the last gubernatorial election.

Q. Was each club alloted a certain number of positions A. I don't know.

Q. Once the organization sent an employee, do you know whether he was interviewed with respect to his ability to read

and write? A. If he didn't produce, at the end of the second day he was replaced.

Q. Who was checking on them? A. We have chief clerks and supervisors.

Q. Now, what were these clerks doing? The registration cards came in— A. They checked it.

Q. What is the first thing they did with them? A. The registration from the mail came in back to 80 Varick Street, the 9th floor, that is the general office of the Board of Elections. Every application was clocked on the very day they came in, regardless of the amount.

Q. How many mail registrations did the New York City Board of Elections receive up to and including November 2,1976? A. Up to and including October 4th and postmarked October 4th, I am pround to say, New York City brought in 468,586 mail registrations.

Q. Is it your testimony that that precise number was closed and stamped? A. Every single one.

The Court: Can you give me that number?

The Witness: 468,586.

Q. What was that date? A. The last date they could have been delivered personally at the Board of Elections was October 4th. We were open until midnight.

Q. Was the clock stopped for four days to give you time to catch up? A. No, we did not stop the clock.

Q. You say there wasn't a single, solitary mail registration that came in that remained unstamped and unclocked?

Mr. Schwartz: I object to this examination on the ground this is direct examination.

The Court: I know. Do you think it sounds like cross-examination?

Mr. Schwartz: Yes.

The Witness: I am a big girl; I can answer.

Q. And a defendant? A. Right. And a criminal.

Q. No, this is not a criminal procedure. We are trying to prove that it is not. A. Your papers you put out in the street list me as a criminal.

Q. Not I. A. Let's not go into that.

Q. Now, when these clerks came in, did they have any paper or syllabus or instruction sheet telling them what to do? A. No, when they came in the names and addresses were noted, Social Security numbers were noted, and they were then assigned to a chair and a deck, and they had a supervisor. Every twenty employees had a regular employee who supervised the work.

Q. Did these regular employees, the supervisors, have any written instructions? A. No. I had a meeting with the chief clerks time and time again, and we went through whatever problems might have been presented at the time. We tried to correct the problems. The chief clerks in turn went back to their offices and instructed their employees on how to proceed.

Q. After these things were clocked in, what was the next thing the clerks were instructed to do? A. After they were clocked in at the general office of the Board of Elections they were then sent into boroughs. They were also put into alphabetical order by boroughs. Then sent to the— We made an IBM printout for our own office use by county, by week of the application that came in through the mail. And this may sound like it took a long time, but within 48 hours that particular batch was sent to the respective boroughs for reprocessing.

Q. You say they were put on a computer? A. Yes.

Q. Was that done through a punch card system? A. I have no idea about the IBM. We have an IBM department in our office, in our building.

Q. How was the information transmitted through the computer department from your office? A. They took the application and it was just a question of putting down the name and the address and the date that it was clocked. That's all that we had.

Q. How long after a particular application was processed was it that it got onto a computer? A. The same day. They were closed, divided by borough and alphabetized.

Q. Do you have 468,586 names on computers? A. We have, I would say, about 375,000 names on computers.

Q. Now, how do you account for the fact that you registered 468,000 people and only have 375,000 on a computer? What happened to the others? A. The last day we got over 100,000 applications. It now became important they be sent to the borough office immediately without making a list for our own records.

Q. You would like to amend your last answer to say that some but not all went to the computer room and went the same day? A. I said all were clocked.

Q. I am asking you whether all got on the computer and you said that they went up—

Ths Court: Objection sustained. Argumentative.

Mr. Fetell: Thank you, sir.

Q. After the election, were those names put on a computer? A. That computer list we are describing now is just for our own use. That is not a list of those people who are registered. For some reason their registration may not have been valid.

Q. Ms. Dolen, what if anything was built into your system to determine whether a person registered more than once? A. When the card—the buff card was put in a binder, if we saw another card with the same name, same birth date, same address, we didn't put the new one in. We just put that aside.

Q. Who put them in the binders at Varick Street? A. Each borough.

Q. When you say we, you are referring to the— A. The entire borough. The entire City of New York.

The Court: When you asked what is built into the system, I must note the observation of the Court. That sets out the pattern of the election process designed at least to safeguard against fraud and irregularity. I said before I consider an election an adversary proceeding. The statute provides in the State Constitution, right through the legislative enactment and the election law, that the two parties that receive the highest vote in the last election—it usually means the Democrats and Republicans—have equal representation on the State Board of Election, on the City

Board of Election, down to Inspectors of Election.

Now, it may be that the Inspectors haven't been doing their job. At least the system is designed to safeguard against fraud and irregularities. Mind you, the election law is so specific to say that the election inspectors are supposed to compare the signatures, placing a hand over the signature on the buff card first, and announce in public that so and so is voting.

Mr. Fetell: The law changed on that score.

The Court: That I don't know.

Mr. Fetell: I am about to present it right now. I ask the Court to take judicial notice of Section 153 of the Election Law and more specifically Subparagraph 9 which says: That the County Board of Election when it is not satisfied from an examination of an application for registration, or after its initial inquiry that the applicant is entitled to such registration may order an investigation through an officer or employee of the State or County Board of Election, Police Officer, Sheriff, or Deputy Sheriff.

I understood what your Honor said, that the system was designed for one party or the other party—and the party is not majoritive for the parties to keep an eye on each other.

Apparently the legislature in their wisdom made the County Boards of Election the policemen over it and that is why I am examining Ms. Dolen now.

The Court: I suggest that Section 153 has nothing to do with what I just said. Nothing.

Go ahead.

You asked this witness whether the system—what controls the system has.

Mr. Fetell: When I said system, I wasn't referring to the general word. I'm talking about their mechanics as an official Board of Elections. Maybe I used the wrong phrase in that regard. I didn't mean the country system. I was ambiguous and I apologize.

The Court: You don't have to apologize. I think the question was proper. Ms. Dolen answered it. And I said that I wanted to note what I regard as safeguards in the

system, in the structure, and I said what the statutory plan was. I didn't say it worked out that way.

Q. Ms. Dolen, once these regulations were put into the computer did anybody in the Board of Elections get a readout to check the double registrations? A. I got a copy of the—this is not a checking of the registrations.

Q. The question is, in its entirety, did anybody get a readout for the—alphabetical readout—to check for double registrations at that level? A. No, not to check for double registrations.

Q. Was there anything—when this system was implemented by the Board of Elections, was anything done to spot check for the possibility of registering from tombstones to empty lots to empty buildings? A. No, there is an affidavit on the application and when it is signed—that affidavit must be signed by the applicant. And when that application comes in with the signature on the affidavit it is presumed that what the person filled out is the truth and also there is a Class E Felony on the other side which charges in the event it is proven you are not telling the truth, you are subject to a Class E Felony.

Q. Then the underlying methodology, if I can use that word, the underlying approach by the New York City Board of Elections in the November 1976 election, was with respect to registration if an affidavit was signed, that was a fulfillment of the Board of Elections obligation under the election law? A. The election law, if anyone wants to change a person's registration, there is a format to do that. Unless we get a challenge, we presume that the registration is in good order.

The Court: I think the Election Law provides a judicial procedure for determining the validity of registration. All the judicial proceedings as far as I can determine are designed to eliminate invalid, fraudulant registration before election.

It is questionable whether there are procedures available after election.

I think the New York State statutes do provide a judicial

procedure for challenging registration.

Mr. Fetell: Again, your Honor, I'm referring now to the—I am limiting myself now to the obligation of the Board as mandated by the legislature in Section 153.

Q. Other than checking to see whether an affidavit was signed, did the Board do anything to determine whether an applicant was or was not entitled to registration enrollment or transfer or registration, and I'm reading now the language of Subsection 8 of 153, other than looking at affidavits, did you do anything? A. Sent out the ID card and the yellow card that Mr. Wiseman described in an envelope. On that envelope there are instructions to the post office to not forward. We send that out first class mail and we ask if it is returned to us it be returned first class mail.

Q. Do you have a record in your office, a warehouse which contains any letters that come back as undeliverable? A. Yes. No, we don't have undeliverable—addressee unknown.

Q. That is undeliverable? A. When we had time we sent it out a second time.

Q. My question, ma'am, was is there a repository somewhere where the stuff came back? A. Yes.

Q. That is available right now? A. That's right.

Q. So that if hypothetically, 1742 Bath Gate Avenue in the Bronx, which is in the 26th E.D., 78th A.D., if that hypothetically—that photograph represents 1742 Bath Gate Avenue in the Bronx, and if hypothetically somebody used that address to register—

Mr. Schwartz: This is Exhibit what?

The Court: Yes. I wish you'd give the Exhibit number.

Mr. Schwartz: I don't think it is an exhibit.

Mr. Fetell: I will take another one. I thought they were all marked.

Mr. Schwartz: That is an exhibit—

Mr. Fetell: I will find another empty lot for you.

Mr. Schwartz: I am sure you will, you've found enough of them already.

Mr. Fetell: I withdraw the question. Is that all right?

The Court: Show it to the witness.

Mr. Fetell: I want to show him the sticker number first. Exhibit 9 in evidence.

Q. Ms. Dolen, if hypothetically a person were to have given 1656 Washington Avenue in the Bronx as his address, and if hypothetically this photograph represents what 1656 Washington Avenue looked like in the latter half of 1976, you would have an undeliverable letter in the archives of the Election Board? A. If the Post Office brought it back we would have it undelivered.

The Court: Do you have an instruction on the envelope for the Post Office not to deliver the mail if the addressee was not at the premises?

The Witness: Yes.

The Court: He has to perform his obligation under your direction?

The Witness: Yes.

Q. Did any come back in this manner? A. I would say of the 468,000 approximately 20,000 came back. Not from empty lots, just addressee unknown.

Q. Was the 468 the number you ultimately registered? A. No.

Q. Or the number of applications? A. Applications we processed.

Q. How many did you register out of 468,568? A. 20,000 came out. 448,586.

Q. Exactly 20,000 on the nose? A. No, give a little, take a little, I didn't stop to count them.

Q. Is there a count anywhere? A. We probably will get around to counting them. Right now, first things firts.

Q. Were any rejections made out by your office? A. (no response.)

Q. 468,586 applications were received? A. Yes.

Q. 20,000 of them were rejected because the letters bounded; is that it? A. (No response.)

Q. Or came back undeliverable? A. I can't answer that with a yes or no.

Excerpts from Transcript

Q. Go ahead. A. With all due respect to the Post Office, I am not too sure they are doing their job correctly and many of them were returned zip code missing. There is one particular building 3333 Broadway. It is a brand new building, with probably new tenants living in there. Everybody would have to register. They were returned because—I don't know how many stories the building consisted of—but it is divided into Building A and Building B although they are all in one building. They call it Section A and Section B. If you lived in Section A and it was B, the Post Office returned it. That doesn't mean to say the people don't live there.

Q. You say some were sent back because they had no zip codes? A. That is right.

Q. Did your clerks check to see whether the zip codes were on the application? A. The zip codes were on the application.

Q. If they weren't, what if anything were your clerks instructed to do? A. We did not return applications promiscuously. We returned an application if the affidavit wasn't signed, if the naturalization information was not complete. We didn't return an application if the color of the eyes was omitted, or if the zip code was omitted.

Q. Did you have two forms: One a form of approval and one a form of rejection? A. Yes.

Q. How many rejections did you mail out? A. I don't have a figure.

Q. The approximate amount. A. No, I don't.

Mr. Schwartz: She answered the question, counsel.

Q. Did you file a report with the Commissioners which reflects the result of this first time mail registration setting forth these totals? A. Did I file a report?

Q. Yes. A. We had discussions at the meetings and I gave them an oral report.

Q. Did your oral report set forth how many rejections evolved from this one? A. No.

Q. You just don't remember? A. I didn't discuss rejections.

Excerpts from Transcript

Q. Where did you get the figure 468,586, is that from memory? A. No, that is from a group of people who actually kept a record of the applications.

Q. Did anybody keep a record of rejections? A. I would have to check with the chief clerk.

Mr. Schwartz: Your Honor—

The Court: The defendant is in the same classification as a hostile witness. I will allow it. If Ms. Dolen can't answer it she will say so.

The Witness: I can't answer.

Q. Nobody tabulated it? A. The chief clerks have tabulated it.

Q. Did your ever see the figures? A. No.

Q. Did anybody ever tell you the figure? A. I know it was a very small amount.

Mr. Schwatrz: This is badgering the witness.

The Court: Yes, but I allow badgering. Special dispensation.

You may be badgered.

The Witness: Thank you.

Mr. Fetell: I do it at my own risk, I am aware of it.

The Court: I am aware of it too.

Mr. Fetell: I understand.

The Court: I don't allow it in every case but in a case when we have a head of a department and lawyers examining on the matters within her knowledge, I will allow it.

Mr. Fetell: Incredulity is something I am entitled to.

The Witness: What was that word?

Mr. Fetell: That is a little bit of colloquy—

The Court: Just lawyer talk. If there were a jury and a lawyer said "incredulity," I would probably stop it.

The Witness: I like to learn.

The Court: He conducts this kind of examination at his own risk.

Go ahead.

Q. Ms. Dolen, did you ever ask somebody to tabulate the

rejection amount? A. Not to tabulate. I did ask how many were rejected and the answer was very few.

Q. Now, did your office mail out approval documents? A. Yes.

(At this point the Official Court Reporter was relieved by Emanuel Karr.)

Q. How many such approval documents were mailed out? A. Well, whatever, there were 468,586 less the ones that would have been rejected. I don't know what the total would be, would have been of the approval ones. If you weren't rejected you were approved.

Q. You have no tables of that? A. No, I said I didn't.

Q. Does the City have franchised mailing or do you have to pay for mailing? A: No, we have to pay.

Q. Do you submit to anybody a calculation of the amount of postage spent by your office in returning rejections or approvals?

Mr. Schwartz: Objection.

The Court: Overruled. I will allow it.

A. I don't have knowledge of that, the Finance Office would have that.

Q. Isn't that something that passes through you as the Director? A: Well, what you mean is the actual figures?

Q. Well, approximately. A: It runs into the hundreds of thousands of dollars.

Q. You never got a report on that? A. I would have a report, I have a report in the office, but I don't have it with me.

Q. You don't remember what figures are? A: No.

Q. Okay, fine. Now I refer you to Section 153, paragraph 7(b): "The county Boards of Election shall review each applicant." Now I ask you, ma'am, other than checking to determine whether the affidavit was signed, was anything else done to "review each applicant?" A. Yes, the most important thing was the naturalization part, that was checked. We scrutinized those, that part of the application, as I said. Now, if the color of the hair was left out or the color of the eyes, we didn't return the application.

Q. But you checked the signature of course on the bottom? A. Yes.

Q. What was the purpose of stamping these cards as they came in? A. Because this is only an application (indicating). When it came into the Board of Elections we clocked it and it then became a registration.

Q. That is under the statute? A. That is right.

The Court: Now this has nothing to do with the issues in the case, but I am curious:

Did they ever discuss when they got this form up the requirement of inscribing the Social Security number if there was one?

The Witness: Yes, the original form had the Social Security and then an action was brought under the Civil Rights by the Civil Liberties Union—

The Court: You mean the Civil Rights Act?

The Witness: That is right.

The Civil Liberties Union said that the civil liberty was being infringed upon by asking for that personal information.

The Court: And they won?

The Witness: Now on the second one we did not—

The Court: Did they win on that issue?

The Witness: They took it off, they withdrew the first where we were going to check with the Social Security number.

The Court: Did a judge decide that, was there a decision on whether it infringed on the right of privacy?

The Witness: Yes.

Mr. Blabey: Your Honor, may I assist on this; may I say that under the Privacy Act of 1974, which your Honor can take judicial notice of, it prohibits the use of asking for Social Security information unless you are authorized to do so before I believe January 1, 1974, that is, unless the specific federal statute permitted you to ask it; otherwise you are prohibited for asking for that information.

The Court: Well, then, the Act should have been

amended to permit you to ask that because that would be an obvious control.

Mr. Blabey: This is state legislation, that is a federal act.

The Court: Let me say this, that every lawyer that comes in before me and asks for fees under the Criminal Justice Act has to have his Social Security number.

The Witness: The second time around it was taken off.

The Court: You would think that the Civil Liberties Union would be interested in protecting the right to vote. Well, go ahead.

By Mr. Fetell:

Q. Mrs. Dolen, how did these applications—I withdraw that for the moment. When you said they were stamped, you are referring to the portion of Section 153 which says that registrant is registered to vote once the appropriate county board receives it: is that right? A. Right.

Q. That is prima facie, and then it is up to the Board to reject if it finds basis for it, and in the absence of such rejection he is a registered voter merely by the act of sending it in: is that correct? A. Yes.

Q. It is your testimony that you know of your own personal knowledge that 458,586 were actually date and time stamped without exception?

Mr. Schwartz: That was asked and answered.

Mr. Fetell: I am repeating it for a reason.

A. Well, as I said if one or two—

Q. Pardon me? A. I say if one or two slipped by without being stamped, but each batch that came in was stamped and clocked.

Q. Did these come in by mail or were they dropped off? A. They came in in bags, mail bags in the morning and—

Q. That is United States mails, through the United States mail? A. That is the only mail we have here.

Q. When you say mail bags— A. The United States mail.

Q. That is what I want.

The Court: Did any individuals, to your knowledge ever come in and say "Here, I would like to drop off twenty or fifty applications?"

The Witness: That is what I was coming to. In the communities—

Mr. Fetell: Or 2,500 or 25,000.

A. Some came in ten thousands, some twenty thousand.

Q. At one shot? A. At one shot.

Q. Now, when that type of delivery was made, five, ten, twenty thousand by one person— A. Yes, they clocked them.

Q. —was that—I say was that treated in the same way as the ones that came in through the United States mail? A. Every one was treated the same, they were in no way different.

The Court: Can you identify any of the individuals who brought in ten thousand?

The Witness: Oh, surely.

The Court: Who are they?

The Witness: There was an operation, I think it was a program called Operation Big, that was city-wide. Then the AFL-CIO, the League of Women Voters, all different community groups.

Now anyone who came in and asked for forms, we have a receipt; so we have a list of all of the groups and the number of applications that each group got.

We have, as I say, the names of the persons who were responsible for that particular program.

The Court: So individuals who were interested in the outcome of the elections brought in five thousand or ten thousand applications?

The Witness: That is right.

Q. Do you have that on a single list? You tell us you have receipts from people asking for a large — if I walked in and asked for two, you wouldn't take my name and address, I take; is that right? A. We had at least three hundred telephone calls a day asking—

Q. No. A. —asking for to please be good enough to send them one or two applications, which we sent out immediately.

Q. I think you indicated to his Honor that when somebody came in for a large amount you would have them sign a receipt? A. That is right

Q. What was the purpose of that? A. So that we had a record, we had to keep a record. I have to show the City the reason why I needed another million forms and what I did with the first million.

Q. Do you still have those receipts; are they readily available for the first thing in the morning? A. Anything you want.

Q. Within the next twelve hours? A. Whenever you want them.

Q. By tomorrow morning? A. I have it in a book right now.

Q. You have it in a book? A. Yes.

Q. Do you have any recollection of the names of the organizations that were big customers? A. I just told you, the AFL-CIO.

Q. Aside from them, have any community groups come in? For example, from the South Bronx. A. Community groups, Puerto Ricans, Jewish groups, Irish groups, Greek groups—every ethnic group, every American gruup, everybody.

Q. Do you have that list? A. I told you four times I have the list. I'm not going to get it now.

Q. I am just looking at my clock. Could that be delivered to us by tomorrow morning? A. Surely.

Mr. Fetell: And if it is, your Honor, may we look at it?

The Court: Sure, if it is delivered to you it is for your inspection.

Mr. Fetell: I thank you, sir. I wanted them to understand it.

By Mr. Fetell:

Q. With respect to the increased registration, a 440,000 increased registration, were any steps taken to change the

procedures at the polls to take care of this new traffic, this new influx of voters? A. It is not new traffic. The inspectors that we have were accustomed to having groups of peopl coming in to vote as they finally did in 1976; it was the last—

Q. Did you ever receive a complaint of large groups of people coming in at one time, into a particular polling place?

Mr. Schwartz: I believe she was in the middle of a sentence and—

Mr. Fetell: I heard the period; I am sorry.

The Court: Did you complete your answer?

The Witness: Well, all I know is that there are no—there are no special hours when groups are going to come in. We have no idea at ten o'clock whether thirty people are going to come in—

Mr. Fetell: That wasn't my question, ma'am.

Q. My question was, Were any steps taken to increase the number of personnel at various polling places to accommodate this reflected increase of 448,000 new voters? A. This 448,000 new voters are replacing about 400,000 people that have been taken off the rolls, so actually the same number of people—As a matter of fact, the registration is down by about 300,000 as against 1972.

Q. It has been experienced, Ms. Dolen, that new voters take longer to vote and to check than old? A. They are given three minutes; the law gives them three minutes in a polling place.

Q. Were you given any indication or did you receive any phone calls on Election Day that there were problems at particular polling places of large groups coming in at the same time? A. This was the first year that I got very, very, very few complaints about long lines and about— The people were just out to vote.

Q. You were satisfied from your own investigation of the polling and the voting procedures this year that it was more orderly than normal? A. Yes, it was.

Q. It was quieter than usual? A. Right-on!

Q. Less chaotic? A. That is right.

Q. Were you—I withdraw that. What happened— What is the obligation of an inspector at a polling place who at the close of day notices in taking the count that there were more votes cast, or more people entered the booths than there were buff cards and were they given any instructions as to what they were to do? A. Inspectors are brought down to the boards, the respective Boards of Elections, two or three times a year. They are given instructions as to what to do.

Q. What are the instructions specifically? Well, I will reframe it. Inspector has a Statement of Canvass, and it has to be signed by the chairman and the three inspectors on opening, right? A. Right.

Q. And there are certain figures, the numbers that are written on the Statement of Canvass, which they say are correct, and then they look at the counter, right? A. Yes.

Q. Now, if at the close of the day, they are required to do the same thing, make entries and then sign it, correct?

Q. Now, what instructions were they given by you during this course of the year as to what they are supposed to do when they note that the public counter indicated that there were more curtain operations than there were buff cards? What were they supposed to do? A. When they open the machine in the morning, sometimes instead of it reading zero, zero, zero, it may by 008, or 012, and if it is 012, then they have to make a note on their inspector's report as to the public counter, and then at the end of the evening that number is to be deducted from the total.

Q. And what happens in a situation where they find that there were more, a higher number on the public counter than there are buff cards, and they can't account for it by the first opening discrepancy? What are they supposed to do? A. You are making up instances that I don't know about.

The Court: How much are inspectors of election paid for an election day?

The Witness: $37.50.

Mr. Fetell: Your Honor, that is a question which I am

going to object to on the grounds of irrelevancy, and I am going to be so bold—

The Court: Well, you don't have to be bold to do it—

Mr. Fetell: I say that because I would expect that they would do it right even if they were paid nothing.

The Court: Oh, really?

Mr. Fetell: For thirteen years I have been on a school board for nothing. I consider it as pro bono, perhaps I am still foolish enough to believe—

The Court: Well, we are talking about Mr. Average American, because I recall a time when those jobs were hard to come by, and there were more applicants for the job than there were positions. Then there was a time when the Board of Elections took on almost anyone, because it was unattractive. But for $37.50, I imagine that you would get people.

The Witness: It is very, very unattractive. They have to be at the polls at 5:30 in the morning, and with the crime rate being what it is, there are not too many people who want to come out at that hour, particularly in the City of New York.

The Court: I think the fact of their being paid $37.50 a day might be helpful to the plaintiff because I would assume they would get capable inspectors.

I thought that they were paid what the State pays for jurors, like $12 a day.

The Witness: No.

Mr. Fetell: I don't want to continue further on this, but I would just take a firm position whether one is paid $100 or zero, one has the right to expect the same results under the law, and that is why I entered a formal objection.

The Court: We might get a different kind of inspector of elections for $37.50 than we might get for $10, and I thought that that might account for some of the sloppiness.

Mr. Fetell: My view is that if you pay them $100 a politician is really going to grab that off for the boys, so it goes both ways, your Honor; it is a tough one.

Q. Mrs. Dolen, do you make allowances for any discrepancies because of long hours and low pay? A. That is why we have a recanvass of the voting machine.

Q. Were these voting machines recanvassed? A. They are later all recanvassed.

Q. When is that done? A. On November 9th.

Q. And if there are districts in which on recanvass it was determined that more people went into the machine that were entitled to by reason of the buff cards, would that be data or information that would come to you as executive director? A. No.

Q. Who would it go to? A. I don't know if anybody has made any such report.

Q. So you have no way of knowing whether on November 2, 1976, the election, there were any instances in which more people got into the booths than were entitled to by reason of having a buff card? A. Practically speaking, this is the only action, yours is the only action that has been brought—

Mr. Fetell: I move to strike.

The Court: Strike it out.

The Witness: Let me answer—

Q. I am asking you, ma'am, has it come to your attention as the executive director of the County Boards of Election whether there were any demonstrated instances of where the public counter showed up higher than the number of buff cards for that machine: Did any such instances come to your attention? A. No. It would, but it didn't.

Q. It didn't? A. Right.

Q. In other words— I will withdraw that. Is this information checked and are such tables made? A. No.

Q. If one were to take that statement of canvass, can't you check it against the number of registered voters? A. Well, if an election district—

The Court: Well, I don't see what this witness did after the election would in any way affect the validity of the election.

Mr. Fetell: Well, your Honor, we have now reached one of the areas of proof in which, with all due respect, the

plaintiffs are diametrically opposed to the ruling of the Court, and I have indicated at the outset that there were two such areas. Your Honor has set up a certain standard and we disagree with it. Now—

The Court: What does that have to do with this question which you are asking her, what her duties were in examining these statements of canvass, that is after the election had taken place. How could whatever Mrs. Dolen did or had done affect or infect the election?

Mr. Fetell: That is an easy one: If the County Boards of Election and the State Board of Elections had done its work and checked and found discrepancies, then they had an obligation to report it through channels to the Secretary of State and the Governor, to let the Secretary of State and the Governor determine whether they wanted to certify the election. But if they don't get that input in Albany from the very public official obligated by law to check, then I suggest to your Honor that the Governor and the Secretary of State will be put in a very compromising position by reason of nonfeasance, malfeasance—

The Court: How would that affect the election or affect the reporting?

Mr. Fetell: It would surely affect the election; the Governor or the Secretary of State may refuse to certificate the election, and that is a power of the Secretary of State, he may refuse to certificate the election, just as the Secretary of State in Ohio now refuses to certificate, although I don't know what he is going to do later.

That is our position.

The Court: Go ahead; go ahead.

By Mr. Fetell:

Q. I would like to know whether there are any procedures followed by the Boards of Election of New York to insure the regulation, the procedures—I will withdraw that question. After the vote is taken and an official canvass is made, what if anything is done to determine whether the figures submitted on the Statements of Canvass represent irregularities or a valid election? A. To my knowledge—

The Court: Did you say irregularities or a valid election?

Mr. Fetell: Yes.

The Court: Objection sustained.

Mr. Fetell: Irregularities.

A. To my knowledge nothing is done other than our recanvass of the voting machines and a recanvass of the A ballots.

Q. Mrs. Dolen, is anybody entitled to walk into a voting machine on election day who has not been properly registered? A. No.

Mr. Schwartz: Objection.

Q. And if there are more persons voting on a particular machine than they are entitled to go into that machine by reason of valid buff cards, what if anything is done by your office? A. How do you figure there are more people voting on a machine than sign the buff cards? By what, how do you prove that?

Q. Is any check—all right. Is anything done if—if a tally, if the public counter shows 100 and there are only 90 buff cards, is that prima facie an irregularity that there were twenty more bodies counted than should have been? A. You are just making an instance.

Q. I'm asking hypothetically. A. But I can't answer hypothetically.

Q. I'm asking you to.

The Court: She can't. That is the answer.

Q. And there is nothing in the work that you did which is designed to prevent that from happening; is that correct?

The Court: Objection sustained.

A. That is right.

The Court: You are assuming a state of facts that this witness will not accept.

Can you explain the differentiation in the count where the public count shows that the number of votes cast was more than the number of buff cards in the election district?

The Witness: Well, as I said at the very beginning, the inspector may have been lax in failing to put down the actual number on the public counter.

The Court: That is the explanation that there might have been twelve more?

The Witness: That is right.

The Court: And that then didn't put it down, so that if there were twelve votes over they could account for the twelve?

The Witness: They would have to deduct, right.

The Court: Is there any other explanation?

The Witness: Well, perhaps I am mistaken but I don't think people go in and vote twice.

By Mr. Fetell:

Q. You would believe that that was a crime, wouldn't you? A. That would be a crime, I would say I don't condone it.

Q. Do you recognize the existence of the fact that people lie and commit crimes in the City of New York?

Mr. Blabey: Objection, your Honor.

Q. I mean in your official capacity—

Mr. Blabey: Objection.

Q. In your capacity with the Board of Elections of the City of New York, do you presume that there is no fraud among voters? A. Well, I wish we had Utopia—

Mr. Schwartz: Objection, your Honor.

The Court: Well, just because Mr. Fetell volunteered the statement I will allow the witness to answer.

A. I said I wish we had a Utopia of that kind.

Q. Do you recognize that it is a part of your responsibility and the responsibility of the Board of Elections to look for irregularities and report them to the proper authorities, if found? A. No, we don't look for irregularities; if they are called to our attention we check them out.

Q. Were any irregularities called to your attention in connection with this presidential election? A. A few.

Q. And what did you do to check them out? A. Alleged irregularities.

Q. That is right. What did you do to check them out? A. I

heard from the Justice Department. I called the Chief Clerks of the respective boroughs that the alleged irregularities were taking place and they personally sent out employees. We didn't rely on the inspectors. And in nine out of ten, in nine out of ten cases, the irregularities were strictly allegations, there was no proof to them, and we have that down in writing, too, and I reported back to the Justice Department.

Mr. Fetell: I have no further questions of this witness.

The Court: Mr. Schwartz?

The Witness: Now is this cross-examination?

Mr. Schwartz: Yes.

The Court: Mr. Schwartz, will you proceed, please.

Cross-Examination by Mr. Schwartz:

Q. Mrs. Dolen, previously to today there was some testimony that relied substantially on the Statement of Canvass, the Inspectors' Statements of Canvass and I understand from conversations that I previously had with you that there is such a thing as a Statement—a Statement and a Canvass—what is the correct name? A. Statement and Return.

Q. Yes. Are they synonymous, and if not, what is the difference? A. This (indicating) represents one election district, each green sheet. The Statement and Return represents the election districts for the entire Assembly District.

Q. I see. And would there be a reason for the Statement of Canvass to have a vote count that is different from the Statement and Return? A. Oh, yes, if there are errors made—and that is why—well, our clerks, when they get the entire Assembly districts in back from the Police Department, put them in election district order and then they take the figures from those green sheets, without making any changes, and they put them on to the Statement of Canvass and Return. Then, when the machines are opened, those statements—

The Court: Are they opened in the presence of representatives of both parties, both political parties, the Democratic and Republican?

The Witness: And all candidates and splinter parties, and all of the candidates later have to be present on November 9th and on November 16th is when we open up the counters and from them we derive the addresses of what is in the five boroughs, and these sheets are taken by our clerks and they are checked against the figures on the voting machine.

In addition, there may be a discrepancy of a few votes, there is the write-in vote which the inspectors don't take down on the night of election, those are on rolls of pad, they are in the back of the voting machine, and they are done on the day that we open up the machines.

Excerpts from Transcript

Q. I see. There has been some questioning about publicity, a media campaign, if we can call it that, although I don't think it is quite proper with respect to this particular election: Now, isn't it a fact that it has always been the policy of the Board to encourage registration by whatever means possible and that it is not an isolated election in which something brand new was done; this has been a running policy? A. It is not an isolated policy, no.

Q. There was also mention of allegation of chaos at the polls and confusion. Can you tell the Court a little bit about the representatives that are present at the polls or near the election booths? A. Every candidate is entitled to two poll watchers so that if you have the poll watchers and you have your voters, it looks like a lot of pandemonium. In one school you may have ten or twelve election districts and when you walk in it may seem like an awful lot of people are present. But each polling place, each election district is separate, and certainly the poll watchers for the respective candidates, if there were any irregularities or things that they thought were not proper, he had the police officer to talk to as well as calling the Justice Department.

Q. I see. So that there are poll watchers and there are, you say, two for each— A. Two for each candidate.

Q. What about inspectors, how is that broken down? A. Each board consists of four inspectors, two Democrats and two Republicans, with one voter machine; where the registration is 750 and over, you have two voting machines and you have two additional clerks, one Democratic another Republican.

Q. I see. A. There is also one clerk. If you have four inspectors one of them is always at the side of the voting machine to release it. If you have two machines, you have two, so that the machines are always covered with an inspector.

Q. Do you possess anything within your knowledge to explain why a building that might appear abandoned on its face could actually be a legal residence of a registrant?

A. Yes. I think there is something in the law—

Excerpts from Transcript

The Witness: I will word it differently.

A. (Cont'g) The law says that if you are living—

Mr. Fetell: I object to that.

The Court: I think you ought to argue the law. I agree.

Mr. Fetell: Same objection.

The Court: If it's a statute, cite it to me.

Q. On Election Day, you were at your office on Varick Street? A. Yes, I was there from 5:30 a.m. until 11:00 p.m. and kept knocking on wood all day because it was so quiet and uncomplicated.

Q. Did you get any complaints at all? A. Just a few complaints we had our own personnel go out to check, if there was some grounds for it. It was corrected most of the time. The allegations were far-fetched and grossly exaggerated.

Q. Mrs. Dolen, if you know, could you tell me what your understanding is about the situation where there will be an abandoned building and yet a registrant could be in legal residence? A. If the person has been put in a temporary residence with the idea of moving back to the building, should it be refurbished, then his address still remains in that particular building.

Q. Getting back to the Election Day when the complaints came in, you said you sent some of your staff. Specifically, is there a certain level in the office that will go out? A. In Brooklyn, I sent Margarita Ligouri who is an administrative associate. She personally went out and checked two or three of the complaints that had come in through the Justice Department and nothing was happening that was alleged to be happening. In the Bronx, Bea Berger, she is the chief clerk of the Bronx Board of Elections, she sent out staff employees—

Mr. Fetell: I object to what somebody else did.

The Court: Objection sustained.

Q. Now, you mentioned on your direct testimony that packets of applications for registration by mail would be delivered, hand delivered at the Board of Elections? A. Yes.

Excerpts from Transcript

Q. Could you tell us how late your office was receiving those packages? A. On the last day which was October 4th we were open until midnight. For weeks before that we were on an overtime basis. We had permission from the City to work overtime. We had six additional time clocks purchased in Manhattan in the General Office in addition to the regular four that we had so that nothing regardless of how late it came in was left for the following day to be clocked. Because the clocking date in our opinion was very important.

Mr. Schwartz: Just a moment, please.

(Pause.)

Mr. Schwartz: I have no further questions.

Mr. Blabey: No questions.

The Court: Redirect?

Mr. Fetell: Yes.

Excerpts from Transcript

Redirect Examination by Mr. Fetell:

Q. While your were knocking on wood, do you know whether any application was being made to Supreme Court Justices of the State of New York by voters who claimed they were denied the right to vote? A. The didn't claim they were denied the right, many of them came in and claimed they had lost part of their vote in order to get a second vote, that is another reason why the number may be higher, the only way they could get a second chance to go in a voting machine is by getting a court order.

Q. What do you mean, get a second chance? A. People may have come in and said, "I went in to vote and before I knew it I pulled the lever back again and the inspector said that is it, you can't vote now you lost your chance." So the person never had an opportunity to vote. In order to get a second change to go into the booth, she would have had to come down to the borough office and get a court order from one of the Supreme Court Justices assigned.

Q. The polls open what time? A. Six o'clock.

Q. In the morning? A. Yes

Q. By seven a.m., how many such Supreme Court orders were obtained?

Mr. Blabey: I object to this line of questioning. It is not proper redirect.

The Court: If she knows.

A. The judges didn't come here until seven.

Q. The twelve hours, seven to seven, how many orders were obtained in New York? A. Roughly speaking, I would say about seven or eight hundred.

Q. Do you remember telling Peter Kirsch of the New York Times the following: "932 voters got orders authorizing them to use the machine from State Supreme Court Justices at the Bureau of Elections office by seven p.m." Did you make that statement? A. Yes, when he kept calling.

Q. You made that statement? A. Yes.

Q. Does that refresh your recollection that it was 932 approximately? A. Yes, if I told him it was 932, it was 932

Excerpts from Transcript

Q. Is that normal for an election day, 932 challenges? A. Very, very little.

Mr. Fetell: No further questions.

The Court: You may step down.

We'll take a short recess.

Mr. Fetell: Thank you, sir.

(A recess was taken at this time.).

Memorandum Decision
And Order of December 7, 1976

Plaintiffs, who include Republican and Conservative Party supporters of President Ford, and members of the Labor Party, bring this action prusuant to 42 U.S.C. Sections 1983, 1985 (3) and 1988. *1* They seek an order: (1) enjoining the Secretary of the State of New York and the Governor from certifying the Democratic Presidential electors; (2) declaring the Presidential election conducted in New York on November 2, 1976, null and void; and (3) directing that a new election be held. Plaintiffs allege that state officials, acting under the color of state law, committed fraudulent acts in the conduct of voter registration and the subsequent general Presidential election which served to deprive them of their constitutionally protected right to vote. Plaintiffs also assert a claim premised upon a violation of the equal protection clause of the fourteenth amendment, *2* arguing jurisdiction is conferred under 28 U.S.C. Section 1331 (a). That claim, couched in general terms, is that the ballots cast by legitimate voters were debased and diluted by the illegal votes allegedly cast by thousands of unqualified voters.

The contours of plaintiffs' complaint charge officials of the Board of Elections of the City of New York with the intentional and purposeful commission of wrongful acts and the use of slipshod procedures in the administration of mail registration *3* and the conduct of the general Presidential election. The alleged frauds and omissions are said to have resulted in the fraudulent registration of thousands of otherwise ineligible voters, and in turn, the casting of numerous illegal ballots.

Specifically, plaintiffs cite actions taken by Betty Dolan, executive director of the City Board of Elections, which they claim were intentionally designed to undermine the processing and verification of close to 300,000 post card registration applications. Plaintiffs allege that Dolan, armed with the knowledge that partisan groups were wrongfully submitting applications from nonexistent or unqualified

voters, intentionally withheld close to 180,000 post card applications gathered by the Central Board; before sending them to the local Boards in Brooklyn, Queens, and the Bronx, merely two and one-half weeks before the election. Moreover, plaintiffs charge Dolan with unilaterally extending the deadline for receipt of mail applications, allegedly in violation of Election Law Section 153. *4* These acts are said to have prevented the transmission of all of these applicants' names to computer lists, barring their subsequent verification. Dolan, according to plaintiffs, then ordered that buff cards be prepared on all applicants, whether verified or not. The end result, it is argued, was that Board officials indiscriminately sent registration cards to thousands of otherwise ineligible voters, thereby validating their subsequent appearances at polling places and their demands to cast ballots.

Plaintiffs' allegations focus not only on the processing of applications, but on the conduct of the election as well. They seek to hold Board officials primarily responsible for the alleged chaos and confusion on election day. Plaintiffs argue Dolan's public appearance on television and radio, shortly before the election, during which she urged people to appear at polling places, promising they would be permitted to vote, served to foster chaotic conditions. This, coupled with the election officials' alleged failure to adequately staff voting places, is claimed to have resulted in the casting of thousands of illegal votes. Plaintiffs recite allegations of numerous instances where individuals who registered more than once in turn cast several ballots. As well, they charge that nonexistent persons had their votes recorded, as did mental incompetents and convicted felons. *5*

However, plaintiffs do not claim that the illegal votes allegedly cast were sufficient in number to have changed the outcome of the election. Rather, they assert that the election process was so permeated by fraud, a determination of the rightful winner is impossible.

I.

The defendants have moved to dismiss on various grounds. Defendant City Board of Elections, relying on the district court's holding in *Phillips v Rockefeller*, 321 F. Supp. 516 (S.D.N.Y.), *aff'd*, 435 F. 2d 976 (2d Cir. 1970), contends that neither a Section 1983 cause of action nor an equal protection claim can be maintained since there is an absence of state action. Defendant's reliance on *Phillips* is misplaced. This is not a case, as in *Phillips*, where certification of the prevailing candidate is pursuant to federal authority.*16* The statutory scheme existing in New York for the election and subsequent certification of Presidential electors, Election Law Section 291, expressly provides for certification by the Secretary of State and the Governor's confirming signature. *7* Hence, the ministerial act of certifying the Presidential electors is performed pursuant to state authority. *8*

Defendant Hugh Carey, the Governor of New York, and defendant Secretary of State argue dismissal of the complaint is mandated because neither is subject to statutory duties concerning the registration of voters or the conduct of the election, and as such, they are not proper parties.

It is well-settled that a state official may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional act only if that official plays some role in the enforcement of the act. *McCrimmon v Daley*, 418 F. 2d 366, 368 (7th Cri. 1969); *Oliver v Board of Education of the City of New York*, 306 F. Supp. 1286, 1288 (S.D.N.Y. 1969); *Coon v Tingle*, 277 F. Supp. 304, 306 (N.D.Ga. 1967); *Fitts v McGhee*, 172 U.S. 516, 530, 19 S. Ct. 269, 274 (1899). As noted above, Election Law Section 291 *9* requires the Secretary of State to prepare a certified list of electors after the final canvass is approved by the State Board of Canvassers, and to procure the Governor's signature. Although the function performed by both officials in this context is seemingly ministerial, a reading of the provision indicates that the electors' appointment is not validated until both officials have completed their statutory duties. Since both play a part

in the enforcement of the scheme to choose electors, both are clearly proper parties and subject to suit.

While the point is not raised by defendant City Board of Election, defendant State Board of Election moves to dismiss on the ground that, as a state agency, it is immune from suit under 42 U.S.C. Section 1983. Extended discussion is not required of the well-settled principle that states, counties, municipalities, or their agencies are not "persons" answerable to plaintiffs in an action at law or suit in equity to redress enumerated deprivations, pursuant to the Civil Rights Act of 1871. 42 U.S.C. Section 1983. *Aldinger v Howard*, — U.S —, 96 S. Ct. 2413, 2421 (1976); *City of Kenosha v Bruno*, 412 U.S. 507, 512-513, 93 S. Ct. 2222, 2226 (1973); *Monroe v Pape*, 365 U.S. 167, 187-191, 81 S. Ct. 473, 484-486 (1961); *Brault v Town of Milton*, 527 F. 2d 730, 732 (2d Cir.) *on rehearing*, 527 F. 2d 536 (2d Cir. 1975) (*en banc*). Clearly, a Section 1983 action is not maintainable against either the City or State Board of Elections.

The question remains, however, whether a cause of action seeking injunctive relief flows directly from a violation of the fourteenth amendment, rendering a state of municipality subject to the jurisdiction of the court under 28 U.S.C. Section 1331 (a). *10* The granting of equitable relief premised directly upon the Constitution has long been a settled practice accepted without discussion. *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 404; 91 S. Ct. 1999, 2008 (Harlan, J. concurring, 1971); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv.L.Rev. 1532 *passim* (1972); *See, e.g., Loving v Georgia*, 388 U.S. 1, 87 S. Ct. 1817 (1967); *Takahashi v Fish and Game Commission*, 334 U.S. 410, 68 S. Ct. 1138 (1948). *11* When a state or municipal agency is alleged to have deprived individuals of equal protection of the laws, it may be the subject of the federal court's exercise of equitable powers. The City and State Boards of Elections are not immune and may lawfully be enjoined from debasing or diluting the votes of qualified citizens. *12*

The State Board of Elections' reliance on *Aldinger v Howard, supra*, in arguing that once it is found immune from suit under Section 1983, it should not be brought back into the action under a different theory, is misplaced. This is not a case where plaintiffs seek to premise jurisdiction on a pendent state claim. Clearly an independent basis of federal jurisdiction exists in 28 U.S.C. Section 1331 (a). *Aldinger v Howard, supra*, 96 S. Ct. at 2422.

Defendant State Board of Elections additionally argues that it is not a proper party to the action since it has little if anything to do with the registration of voters and administration of the elections. The court disagrees. Although the County Boards of Election have the primary responsibility of conducting both voter registration and the general election itself, *13* it cannot be said that the State Board is entirely removed from the electoral process. Pursuant to Section 470 of the Election Law. *14* The State Board is vested with the responsibility of enforcing the provisions of the election laws. It was the intent of the legislature in creating the State Board of Elections that a coordinating agency exit to oversee the execution and enforcement of the laws relating to the elective franchise and to foster citizen confidence in the political process. Election Law Section 466. Hence, it can hardly be argued the State Board is not a proper party to this action. *McCrimmon v Daley, supra*.

Finally, it is argued that the action should be dismissed for plaintiffs' failure to join all fifty-seven County Boards of Election, as well as the Democratic Presidential electors, as necessary parties to this action. Although, as defendants contend, a successful candidate is a necessary party under New York law in a suit to recover his position, *Matter of Ullman v Power*, 17 App.Div.2d792,*aff'd*, 12N.Y.2d 724(1962); *Lohmair v Ulster County Board of Elections*, 50 App. Div. 2d 1055 (1975), in this case the federal law governs in procedural matters. *Erie Railroad Co. v Thompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

Rule 19 of the Federal Rules of Civil Procedure vests the

court with wide discretion in deciding whether to proceed in the absence of necessary parties; application of the joinder rules requires a balancing of interests, *Kamhi v Cohen*, 512 F. 2d 1051, 1054-1055 (2d Cir. 1975). Determinations of indispensibility and necessity are grounded in equitable principles, *Teney v White*, 476 F. 2d 203, 207 (5th Cir.), *modified and aff'd on rehearing*, 486 F. 2d 310 (1973). Were we blessed with the luxury of time in this matter, the express terms of Rule 19 (b) would require joinder since all parties are subject to process and their addition would not defeat the court's power to hear the matter. Yet, where it is only a matter of days within which this court must act, *15* and the interests of the successful electors are adequately protected by counsel for the existing defendants, equity demands that the court proceed in their absence, *Teney v White, supra* at 207.

Accordingly, we turn to a consideration of whether the complaint states a claim upon which relief can be granted.

II.

The Supreme Court has unequivocally stated that:

> the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote...

Reynolds v Sims, 377 U.S. 533, 554, 84 S. Ct. 1362, 1377-78 (1964) (citations omitted). The right to vote may not be denied by alteration of ballots, *see United States v Classic*, 313 U.S. 299, 315, 61 S. Ct. 1031, 1037 (1941), nor "diluted" by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371, 25 L. Ed. 717 (1880); *United States v Saylor*, 322 U.S. 385, 64 S. Ct. 1101 (1944). As the Supreme Court said in *Reynolds v Sims, supra*, where political districting in Alabama was challenged under the fourteenth amendment:

> The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

377 U.S. at 555, 84 S. Ct. at 1378 (footnote omitted). *See Hadley v Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 52, 90 S. Ct. 791 (1970); *South v Peters*, 339 U.S. 276, 279, 70 S. Ct. 641, 643 (1950) (Douglas, J., dissenting); *Hennings v Grafton*, 523 F. 2d 861, 863-64 (7th Cir. 1975). Thus, while *Reynolds v Sims* was a case involving re-apportionment, there appears to be little distinction, insofar as the fourteenth amendment is concerned, between dilution of a citizen's vote by malapportioned political districts and dilution of valid ballots by votes cast by persons not entitled to vote.

Despite the importance placed by the Supreme Court on the right to vote and the integrity of elections, not every election irregularity will give rise to an equal protection or due process claim. The Second Circuit Court of Appeals rejected the argument that administrative infirmities in an election, in the absence of "wilful or knowing" dilution of ballots by illegal voting, create a remedy in federal courts:

> Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law. Absent a clear and unambiguous mandate from Congress, we are not inclined to undertake such a wholesale expansion of our jurisdiction into an area which, with certain narrow and well defined exceptions, has been in the exclusive cognizance of the state courts.

Powell v Power, 436 F.2d 84, 86 (2d Cir. 1970 (footnote omitted). *See Hennings v Grafton, supra; Pettengill v Putnam County R-1 School Dist. Unionsville, Mo.*, 472 F.2d 121 (8th Cir. 1973); *Means v Wilson*, 383 F. Supp. 378 (D.S.D. 1974).

Allegations of misconduct in the administration of a state election must be judged in light of principles governing claims under the fourteenth amendment and Section 1983. It is necessary, first of all, to plead and prove specific acts of misconduct, including the time, place and circumstances of the alleged deprivation of the right to vote. *See Snowden v Huges*, 321 U.S. 1, 10, 64 S. Ct. 397, 402 (1944); *Means v Wilson, supra* at 389. *Cf.* Federal Rules of Civil Procedure 9 (b). Second, "uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'" *Powell v Power, supra* at 88, *quoting Snowden v Hughes, supra* at 8, 64 S. Ct. at 401. *See Swain v State of Alabama*, 380 U.S. 202, 204-205, 85 S. Ct. 824, 827 (1965); *Oyler v Boles*, 368 U.S. 448, 82 S. Ct. 501 (1962). *Cf. United States v Price*, 383 U.S. 787, 86 S. Ct. 1152 (1966); *United States v Guest*, 383 U.S. 745, 86 S. Ct. 1170 (1966). Purposeful deprivation of the right to vote will not be assumed merely because there is evidence that election officials acted incompetently or negligently and, as a result, persons not properly registered were permitted to vote. Rather, intentional acts must be proved, "the quantum of proof necessary being a matter of federal law." *Swain v State of Alabama, supra* at 205, 85 S. Ct. at 827 (1965), *citing Smith v State of Texas*, 311 U.S. 128, 61 S. Ct. 164 (1940). *See also Washington v Davis*, — U.S. —, 96 S. Ct. 2040 (1976). Third, whether the claim for injunctive relief is predicated on Section 1983 or the remedy is sought directly under the fourteenth amendment, the fraud or other unlawful behavior must be committed by persons acting under color of state law. *Smith v Allwright*, 321 U.S. 649, 64 S. Ct. 757 (1944); *Terry v Adams*, 345 U.S. 461, 73 S. Ct. 809 (1953), or by private persons acting jointly with state officials. *United States v Price, supra* at 794 and n.7, 86 S. Ct. at 1157 and n.7. *16* Finally, the party seeking a new election must establish that the fraud or other unlawful behavior changed the otucome of the election. In the absence of proof of a causal relationship between the unlawful conduct and the result of the election,

injunctive relief must be denied. *See* Starr, *Federal Invalidation of State Elections*, 49 N.Y.U.L.Rev. 1092, 1124-27 (1974). *Cf. Lehner v O'Rourke*, 339 F. Supp. 309, 314 (S.D.N.Y. 1971).

The burden which plaintiffs must meet is a heavy one. Moreover, even if a claim is stated under this standard, plaintiffs bear an even heavier burden in demonstrating the necessity for a new election. In the present case, ordering a new election in New York State for President could involve the most serious consequences, raising the question of "whether the relief, if given, might not do more harm than good." *McDougall v Green*, 355 U.S. 281, 286, 69 S. Ct. 1, 3 (1948) (Rutledge, J., concurring). President-elect Carter's victory in New York will provide him with the margin of victory in the Electoral College, which meets on December 13, 1976, to complete the nation's quadrennial task of choosing a President. If New York's electors are disqualified from casting their ballots, and a new election in New York is necessary, possibly no candidate would receive sufficient votes in the Electoral College to be elected President. *17* The delay attendant in holding a new election in New York might disrupt the governing process and leave the nation without a legitimate leader for an unpredictable length of time.

The point, however, is not that ordering a new Presidential election in New York State is beyond the equity jurisdiction of the federal courts. Protecting the integrity of elections—particularly Presidential contests—is essential to a free and democratic society. *See United States v Classic, supra*. It is difficult to imagine a more damaging blow to public confidence in the electoral process than the election of a President whose margin of victory was provided by fraudulent registration or voting, ballot-stuffing or other illegal means. Indeed, entirely foreclosing injunctive relief in the federal courts would invite attempts to influcence national elections by illegal means, particularly in those states where no statutory procedures are available for contesting general elections. *18* Finally, federal courts in the past have not hesitated to take jurisdiction over constitutional challenges

to the validity of local elections and, where necessary, order new elections. *19* The fact that a national election might require judicial intervention, concomitantly implicating the interests of the entire nation, if anything, militates in favor of interpreting the equity jurisdiction of the federal courts to include challenges to Presidential elections.

But before a federal court can responsibly order a new election, the claimants seeking this extraordinary relief must come forward with the most clear and convincing evidence that state officials or persons acting under color of state law, by intentionally depriving qualified voters of the right to vote, altered the outcome of the election. A party contesting a Presidential election carries a heavy burden. Not to put too fine a point on it, this standard implies conduct of a most egregious nature, approximating criminal activity.

Therefore, in judging whether the complaint before us states a claim upon which relief can be granted, the plaintiffs must allege, and be prepared to prove, the following:

(1) that specific acts of fraud or other unlawful behavior were committed in the conduct of the election;

(2) the fraud or other unlawful behavior was committed with the intent or purpose of depriving qualified voters of their constitutionally protected right to vote;

(3) the fraud or other unlawful behavior was committed by persons acting under the color of state law; and

(4) the fraud or other unlawful behavior changed the outcome of the election.

Applying these standards to the pleadings in this case, we find the complaint, as presently drawn, does not state a claim upon which relief can be granted. Rather than dismiss the complaint with leave to replead, because of the time considerations we grant the plaintiffs an evidentiary hearing on their request for a preliminary inujunction. At this hearing, plaintiffs will be allowed to amend the pleadings to conform

to the proof. The defendants' motions to dismiss are denied.

An evidentiary hearing will be held on December 8, 1976, at 9:30 a.m. It is

SO ORDERED.

Jacob Mishler
U.S.D.J.

Footnotes

1. Title 42 U.S.C. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> ***

Section 1985 (3) provides for a cause of action:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing of hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person

as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

***

Title 42 U.S.C. Section 1988 in turn provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent which the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

2. Section 1 of the fourteenth amendment to the Constitution provides that:

> "...No state shall...deny to any person within the jurisdiction the equal protection of the laws."

3. Election Law Section 153, recently enacted in 1975, provides for voter registration by mail. Mail registration procedures were used for the first time in New York in the 1976 elections.

4. Election Law Section 153 provides that an individual shall be entitled to vote if his completed application is received by the County Board no later than thirty days before the general election. Plaintiffs claim that Dolan unilaterally decreed that applications received by October 8, 1976, would be deemed valid as long as postmarked by October 4, 1976. This action, they argue, was in direct contravention of the terms of Section 153.

5. Plaintiffs additionally claim that some 50,000 individuals, for whom no buff cards existed at polling places, were permitted to cast paper ballots. Approximately 80 to 90 percent of such votes were allegedly determined to be invalid.

6. *Philliphs v Rockefeller, supra*, involved the election of a United States senator, and sought to answer the question of whether the seventeenth amendment of the Constitution required the senatorial candidate to receive a majority of the votes cast. Plaintiffs therein sought merely to enjoin the certification of the winner; irregularities in the conduct of the election were not alleged. The district court, pointing to the fact that Election Law Section 296 merely required the State to conduct the election for senator, drew upon the fact that certification was pursuant to federal authority, 2 U.S.C. and Section 1 (a) and 1 (b), in dismissing the Section 1983 cause of action.

7. Election Law Section 291 in full, requires that:

> The secretary of state shall prepare seven lists, setting forth the names of such electors, and the canvass under the laws of this state of the votes given for each person for whose election any and all votes were given, together with the certificate of determination thereon, by the state board of canvassers; procure to the same the signature of the governor; affix thereto the seal of the state; and, in behalf of the governor, send one of these lists so certified to the

administrator of general services of the United States by registered mail and deliver six other lists thus signed and sealed to the president of the college of electors on the first Monday after the second Wednesday in December.

8. Moreover, defendant seemingly ignored the tact taken by the Court of Appeals in passing on the substantive question, avoided by the lower court in *Phillips*. The Second Circuit wrote:

> Since we find this case so clear on its merits, we do not reach the procedural and jurisdictional points relied upon by the district court. *Phillips v Rockefeller, supra* at 979.

9. See, supra, n.7.

10. Plaintiffs, as well, assert a claim for damages also premised upon the fourteenth amendment of the Constitution. They seek to recover $2 million, representing the amount expended by plaintiffs in the Presidential campaign in New York.

The question whether the violation of the fourteenth amendment itself gives rise to a cause of action for damages has not been decided in this circuit. *See Brault v Town of Milton*, 527 F.2d 730 (2d Cir.), *on hearing*, 527 F.?d 736 (2d Cir. 1975) (*en banc*). We find it unnecessary to answer this question since we find independent jurisdictional bases exist for plaintiff's Section 1983 cause of action and their claim for injunctive relief predicated on the equal protection clause.

Other circuits have found jurisdiction over actions premised on the fourteenth amendment. *See Cox v Stanton*, 529 F.2d 47 (4th Cir. 1975); *Construction Industry Association of Sonoma County v City of Petaluma*, 522 F.2d 897 (9th Cir. 1975); *cert. denied*, _ U.S. _ , 96 S. Ct. 1148 (1976); *Hanna v Drobnick*, 514 F.2d 393 (6th Cir. 1975); *Muskegon Theatres, Inc. v City of Muskegon*, 507 F.2d 199 (6th Cir. 1974); *Roane v Callisburg Independent School District*, 511 F.2d 633 (5th Cir. 1975); *Fitzgerald v Porter Memorial Hospital*, 523 F.2d 716 (7th Cir. 1975), *cert. denied*, _ U.S. _ , 96 S. Ct. 1518 (1976).

11. Section 1331 requires that the "matter in controversy (exceed) the sum or value of $10,000." In cases in which injunctive relief is sought, the amount in controversy may be

measured by either "the value of the right sought to be gained by the plaintiff...(or) the cost (of enforcing that right) to the defendant." *Hedberg v State Farm Mutual Automobile Insurance Co.*, 350 F.2d 924, 928-29 (8th Cir. 1965) (Blackmun, J.; dictum). *Accord, e.g., Tatum v Laird*, 444 F.2d 947 951 and n.6 (D.C. Cir. 1971), *rev'd on other grds.*, 408 U.S. 1, 92 S. Ct. 2318 (1972); *Williams v Phillips*, 360 F. Supp. 1363, 1365 (D.D.C. 1973); C. Wright, *Federal Courts*, Sections 34, 134-35 (1976). In the present case, should a new election be necessary, according to the defendants the cost of state and local boards of election would be in the area of $1,350,000.

12. Nor should the eleventh amendment serve to bar plaintiffs from proceeding against the State Board of Elections in seeking equitable relief. *Edelman v Jordon*, 415 U.S. 651, 663-667; 94 S. Ct. 1347, 1355-1357 (1974); *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908).

13. The County Boards are charged with the responsibilities of appointing election inspectors (Election Law Sections 39 and 40), preparing voting machines (Election Law Section 250), registering voters (Election Law Sections 153 and 154), and the canvassing of election returns (Election Law Sections 270, *et seq.*).

14. Section 470 of the Election Law provides that:

> a. The state board of elections shall have jurisdiction of, and be responsible for, the execution and enforcement of the provisions of this article and other statutes governing campaigns, elections and related procedures.
>
> b. Whenever the state board of elections or other board of elections shall determine, on its own initiative or upon complaint, or otherwise, that there is substantial reason to believe a violation of this article or any code or regulation promulgated thereunder has occurred, it shall expeditiously make an investigation which shall also include investigation of reports and statements made or failed to be made by the complainant and any political committee supporting his candidacy if the complainant is a candidate or, if the complaint was made by an officer or member of a political committee, of reports and statements made or

failed to be made by such political committee and any candidates supported by it. The state board of elections, in lieu of making such an investigation, may direct the appropriate board of elections to make an investigation. The state board of elections may request, and shall receive, the assistance of the state police in any investigation it shall conduct.

15. New York State's Presidential electors are scheduled to meet and record their votes on Monday, December 13, 1976. Election Law §292.

16. Section 1985(3) of Title 28, United States Code, creates civil liability against any persons who conspire to deprive other persons or a class of persons of "the equal protection of the laws, or of equal privileges and immunities under the laws." There is some doubt, however, that §1985 embraces purely private conspiracies, involving no governmental action, that interfere with fourteenth amendment rights. *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974); *Gibbs v. Titelman*, 502 F.2d 1107, 1110 n.69 (3rd Cir.), *cert. denied*, 419 U.S. 1039, 96 S.Ct. 526 (1974). *See Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790 (1971). In any event, in the present case the allegations are directed at the conduct of state officials or persons acting pursuant to state law.

17. The twelfth amendment to the Constitution, which governs Presidential electors, provides in pertinent part:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;— The person having the greatest number of votes for President, shall be the President, if such a number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.

This language raises the issue of whether "the whole number of Electors appointed" means the number of electors elected and certified by the individual States, as opposed to the combined electoral votes of all the States. See 3 U.S.C. §5. If the former is the proper construction, then President-elect Carter need only receive a majority of the votes of those electors who are "appointed" by their States and who cast their ballots in the Electoral College. Even if New York's electoral votes are withheld pending a new election, the Electoral College could "meet" and elect Mr. Carter. At present, President-elect Carter has 297 electoral votes committed to him, while President Ford's total is 241. Assuming that the Presidential electors in all other States are "appointed" and cast their ballots, excluding the ballots of New York's forty-one electors would still leave President-elect Carter with 256 electoral votes to President Ford's 241, a clear majority of "the whole number of Electors appointed."

Furthermore, even if a majority of the combined electoral votes of the States is required to elect a President, the twelfth amendment directs the House of Representatives, in the event no person is able to achieve a majority, to "immediately" choose a President. It is possible that, should New York's electors fail the cast their ballots, the House of Representatives would meet and select a President before a new election could be held in New York.

18. It is unclear, for example, whether the State of New York provides either a forum to challenge the outcome of a general election on grounds of fraud or an adequate remedy

in the event serious fraud in a general election is established. Under §330 of the New York Election Law, the State Supreme Court has summary jurisdiction over challenges to primary elections. The only remedy a candidate or his supporters have under §330 in a general election, however, "is that the state court may direct a recanvass or the correction of any error in the canvass...it cannot look behind votes cast on a voting machine to determine whether the persons who cast them were qualified to do so." *Lehner v. O'Rourke*, 339 F. Supp. 309, 313 (s.D.N.Y. 1971). While some state court decisions refer to the institution of a *quo warranto* proceeding to challenge a general election, *e.g.*, *Corrigan v. Board of Elections of Suffolk County*, 38 App. Div.2d 825, 329 N.Y.S. 2d 857 (2d Dep't.), *aff'd*, 30 N.Y.2d 603, 282 N.E.2d 122, 331 N.Y.S.2d 35 (1972); *Periconi v. Power*, 48 Misc.2d 391, 265 N.Y.S.2d 22 (Sup.Ct. 1965), it is uncertain whether such a proceeding is available to contest a Presidential election and, more importantly, whether state courts have inherent authority to order a new Presidential election in the absence of statutory authorization. *See Matter of U.S. Labor Party*, N.Y.L.J. at 10, col. 2 (Sup.Ct. N.Y. County, Nov. 24, 1976).

19. *E.g.*, *Hadnott v. Amos*, 394 U.S. 358, 89 S.Ct. 1101 (1969); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851, 87 S.Ct. 76 (1966); *Ury v. Santee*, 303 F. Supp. 119 (N.D.Ill. 1969). *See Perkins v. Mathews*, 336 F. Supp. 6 (S.D.Miss. 1971) (Voting Rights Act); *Cousins v. City Council of City of Chicago*, 361 F. Supp. 530 (N.D.Ill. 1973); *Dollinger v. Jefferson Cty. Comm'rs. Court*, 335 F. Supp. 340 (E.D.Tex. 1971); *Mann v. Davis*, 238 F. Supp. 458 (E.D.Va. 1964), *order aff'd.*, 379 U.S. 694, 85 S.Ct. 713 (1965).

20. Under §271 of the Election Law, any qualified voter can challenge another person's application for registration. Presumably, the plaintiffs were aware of the alleged illegal registrations prior to November 2nd, yet they have not brought to our attention any pre-election efforts to challenge the registrations.

Memorandum Decision
And Order of December 10, 1976

The court held an evidentiary hearing in accordance with its memorandum of decision dated December 7, 1976.

Plaintiffs, through the use of statistical survey techniques, sought to prove that the November 2, 1976, Presidential election in New York was permeated by voter fraud. A random sample of 2,434 voters, representing 42% of the State's 1976 voting population — 2,821,699 voters — was used to project the minimum number of irregular votes cast in the election. The sample of 2,434 voters was divided into four distinct classes:

CLASS A) — 660 "new" registrants drawn from 32 Assembly Districts ("A.D.'s") in New York City considered by plaintiffs to be most prone to voter irregularities;

CLASS B) — 608 "old" registrants drawn from the 32 A.D.'s in New York City considered by plaintiffs to be most prone to voter irregularities;

CLASS C) — 263 registrants drawn from the remaining 32 A.D.'s in New York City;

CLASS D) — 903 registrants drawn from 62 townships or election wards in Buffalo, Syracuse, Rochester, Erie County and Albany.

The sample voters were chosen in the following manner. In New York City, two election districts ("E.D.'s") from each of the City's A.D.'s were randomly selected through a recognized procedure that utilizes a table of random numbers. Field investigators, working from the ledgers of signed buff cards, recorded the name of every tenth voter (old or new, depending on the particular class) in each of the designated E.D.'s. The methods employed to gather the upstate sample were varied slightly. In Erie County, voters were drawn from a townships' entire voter population if the town, because of its size, was not sub-divided into wards. Otherwise, two E.D.'s in each ward of the upstate cities were randomly chosen and the selection of sample voters was

conducted in the manner described above.

Once the sample was fully compiled, field workers were carefully instructed on investigating voter fraud. A "fraudulent vote" was defined as a vote cast by an individual found not to reside at the address listed on the registration card, for example, a ballot cast by a person registered from an abandoned building or a vacant lot. Using data sheets listing the individual names and addresses of sample voters, volunteers attempted to contact each voter by telephone to ascertain whether he or she in fact lived at the recorded registration address and whether the registrant had voted in the November 2, 1976 election. If an affirmative response was received, the vote was listed as "confirmed valid."

Field investigators were deployed to investigate each voter who could not be reached by telephone. If the voter was found to reside at the recorded address and to have voted in the November election, his vote was designated "confirmed valid." If the voter was not found at the listed address, investigators interviewed neighbors or the building's superintendent. Only if the investigators found no evidence of the sample voter's existence, was the vote cast listed as a "confirmed fraud." Unless there was confirmation by two separate teams of investigators that either a sample voter did not reside at the address of registration or that registration was from an abandoned building or empty lot, the vote cast received only a designation of "unconfirmed fraud." In some instances, individual determinations of fraud were corroborated by documentary or photographic evidence.

After the study's completion, the following data was compiled:

CLASS	POPULATION SIZE	SAMPLE SIZE	CONFIRMED FRAUDS	% OF SAMPLE	UNCONFIRMED FRAUDS	TOTAL FRAUDS	TOTAL B OF SAMPLE
A	209,040	660	44	6.67%	45	89	13.48%
B	685,133	608	44	7.23%	81	125	20.55%
C	1,272,413	263	11	4.18%	13	24	9.12%
D	655,083	903	29	3.21%	38	67	7.41%
TOTAL	2,821,669	2434	128	4.9% (WEIGHTED)	177	305	10.8% (WEIGHTED)

The data, as compiled, was turned over to Dr. Steven Bardwell, a statistical expert. Employing standard statistical methodology, Bardwell extrapolated the absolute findings over the represented 42% of the voter population and drew the following conclusions:

CLASS	POPULATION SIZE	MIN. % OF IRREGULAR VOTES (CONFIRM. FRAUDS)	MIN. % OF IRREGULAR VOTES	LARGER % OF IRREGULAR VOTES CONFIRM. & UNCONFIRM. FRAUDS	LARGER NO. OF IRREGULAR VOTES
A	209,040	6.67%	13,797	13.48%	28,220
B	685,133	7.23%	50,015	20.55%	141,137
C	1,272,413	4.18%	53,434	9.12%	115,789
D	655,083	3.21%	20,961	7.41%	20,962
TOTAL	2,821,669	4.9%	138,207	10.8%	306,108

During his testimony, Dr. Bardwell cautioned that further projection of the absolute findings could not be made over the remaining 58% of the voter population. Moreover, he candidly stated that since the partisan nature of the vote was not a factor in drawing his conclusions, there was no way to determine, through his study, what percentage of the irregular vote was cast for Mr. Carter or Mr. Ford.

Plaintiffs' theory is that their sampling demonstrated that widespread irregularities probably deprived President Ford's electors of their victory. *Lehner v. O'Rourke*, 339 F. Supp. 309 (S.D.N.Y. 1971). Where, as here, direct testimony is unobtainable, opinion testimony based on reliable hearsay is admissible, *Public Utilities v. Pollak*, 343 U.S. 451, 72 S.Ct. 813 (1952); *Bohus v. Board of Election Commissioners*, 447 F.2d 821 (7th Cir. 1971); *United States v. Aluminum Company of America*, 35 F. Supp. 820 (S.D.N.Y. 1940); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff's without opinion*, 343 U.S. 521, 84 s.ct. 699 (1954).

The relevance of this testimony in determining the extent of the irregularities in the vote for Presidential electors depends directly on the "universe" selected for study. If the universe is properly defined, the reliability of the study, in turn, depends on whether the sample selected evidences the characteristics of the universe. The theory upon which a sample is admissible as proof of the universe is "...the 'universe' is, by reason of its uniformity or by reason of some predictable uniformity of recurrence of differences without it, susceptible of fair representation by a randomly selected sample, so that the characteristics of the 'sample' will, within mathematically measurable limits of reliability, evidence the characteristics of the universe." Judge John F. Dooling, Jr., *Polls, Samples, Surveys and Scientific Evidence*, Seminar for Newly Appointed United States District Judges (Feb. 12-16, 1962, Monterey, Cal.). If the sample is properly selected, the characteristics of the sample may be attributed to the entire universe. Note, *Public Opinion Surveys as Evidence: The Polls Go To Court*, 66 Harv.L.Rev. 499 (1953). If the universe is not properly defined, or the sample is not properly selected, it follows that the opinion evidence is irrelevant.

The irregularities are based on evidence that persons were permitted to vote from addresses of buildings shown to have been abandoned and from vacant lots. The plaintiffs claim that the improprieties resulted from the negligence of the New York City Board of Elections and the 57 County Boards of Elections in registering voters by mail, the failure to verify the residences of potential voters, and the failures of the election inspectors of the elections districts (and wards) to require proof of eligibility. These irregularities, which, for the sake of this argument, we assume to have taken place, are based only on a sample consisting of approximately 600 registrants in 32 Assembly Districts in the City of New York, determined by the survey team to be those suspected of a higher degree of irregularities in voter registration than the remaining 32 districts. *(1)* There is no showing, however, that characteristics of the sample are characteristic of any other area in the State. Since the five county boards are under the jurisdiction of the New York City Board of Election, we assume that the practices of those boards are uniform. The sampling of 32 Assembly Districts would be a fair sampling of irregularities resulting from mail registration in the City of New York. It does not sample irregularities arising out of mail registration in the remainder of New York. The court does not consider the evidence relevant to the claim of fraud arising out of mail registration.

Plaintiffs sampled the balance of the registrants in the first set of 32 assembly districts, all the registrants in the rest of New York City's assembly districts and registrants in some upstate areas, including Syracuse, Rochester, Albany and Erie County. *(2)* Though this sampling for fraud is more representative of the universe than that conducted of the mail registrants, its value in predicting the characteristics of the universe is in doubt because it fails to include the other 53 counties of the state.

In designing their study, plaintiffs defined the universe as "restricted to the urban areas of New York State" (Dec. 8, 1976, Tr. 18), comprising 42% of the voter population. Yet, the plaintiffs' own expert, Dr. George E. Bardwell, defined the appropriate universe as "the entire State of New York and the voters in the last Presidential election" (Dec. 9, Tr.221), *i.e.*, the 6,668,262 voters who cast ballots in the Presidential contest. In order to attribute the voter fraud in 42% of the State to the entire Presidential vote in New York, the sample should have included voters in the remaining 53 counties, or, in the alternative, plaintiffs should have shown that the election practices in the unsampled areas were similar to those of the sampled areas.

Even if *arguendo*, the proper universe had been tested, and a proper voter sample selected, nonetheless, plaintiffs' evidence of voting irregularities is susceptible of inferences other than fraud. It is conceivable that in many of the instances where "old" registrants who voted did not reside at the address of registration, there was not fraud at all. Given the existence of a permanent registration system in New York, many of these voters may live in the New York area, but at a different address, and simply never bothered to change their voting address. Similarly, in view of the highly transient nature of urban populations, it is possible that some new registrants changed residences between the time their registration application was filed and election day. This is not to say that such irregularities should be condoned and that serious efforts should not be made to correct these administrative deficiencies, yet, such votes cannot be considered "fraudulent" in any real sense.

Moreover, even if we accept plaintiffs' contentions that 306,107 "fraudulent" votes were cast primarily in New York's urban areas, as a matter of mathematics, plaintiffs have failed to establish that the outcome of the election would have been different in the absence of fraud. As Dr. Bardwell conceded, the partisan nature of the vote was not a factor in his statistical survey (Dec. 8, Tr.A61). As such, it is impos-

sible to determine what percentage of the fraudulent vote went to Mr. Carter and what portion went to President Ford. Nor have plaintiffs presented any independent evidenc that would provide a basis for this court to conclude that Mr. Carter's margin of victory was derived from fraudulent votes. Even if we were to generously concede that 90% of the extrapolated fraudulent vote went for Mr. Carter, this constitutes 275,496 votes, less than President-elect Carter's 288,767 vote margin of victory.

In sum, the plaintiffs have failed to prove that specific acts of fraud were performed by persons acting under color of state law, or that the irregularities in the voting, if eliminated from the final tally, would have changed the result. Accordingly, the court finds no likelihood that plaintiffs will prevail on the merits.

It is therefore

ORDERED that plaintiff's motion for a preliminary injunction is denied, and defendants' motion to dismiss the complaint is granted.

The Clerk of the Court is directed to enter judgment in favor of the defendants and against the plaintiffs, dismissing the complaint.

Jacob Mishler

U.S.D.J.

Notice of Appeal

Sirs:

PLEASE TAKE NOTICE that plaintiffs do hereby appeal to the United States Court of Appeals for the Second Circuit from a judgment entered in the office of the Clerk of this court on the 13th day of December 1976, dismissing the complaint, and do hereby appeal from each and every part thereof, as well as the whole thereof on questions of fact and law.

Dated Brooklyn, New York,
December 13, 1976

Yours etc.

LESTER E: FETELL
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et al. Esqs.
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United States Court of Appeals

For the Second Circuit

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Plaintiffs-Appellants,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN, AND HUGH CAREY,

Defendants-Appellees,

On Appeal From the United States District Court For The Eastern District of New York

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BRIEF FOR PLAINTIFFS-APPELLANTS

STATEMENT

This is an appeal from a judgement entered in the office of the clerk of the United States District Court for the Eastern District of New York (Mishler, U.S.D.J.) dismissing the complaint.

The dismissal followed an evidentiary hearing conducted

before the Honorable Jacob Mishler, Chief Judge, U.S. District Court, Eastern District of New York.

The plaintiffs are voters, legally registered to vote in the Federal Election in the State of New York, plaintiff Lyndon LaRouche was a candidate of the Labor Party for the office of President of the United States, whose name appeared on the ballot in the State of New York, and the Rockland County Conservative Party is a duly constituted political organization active in the Federal Election, which did not support the Labor Party or its candidate.

The complaint (3a) was docketed in the District Court on November 22, 1976, seeking declaratory and injunctive relief pursuant to 42 USC 1983, 1985 (3), 1988, and 28 USC 1331 and 1343. In addition to declaratory and injunctive relief the complaint sought monetary damages.

A review of the procedural posture of this case in the district court requires delineation to bring this appeal into proper focus

In essence, plaintiffs petitioned the District Court to enjoin the Secretary of the State of New York and the Governor of the State of New York from certifying 41 electoral votes to the Electoral College in Washington, D.C. The timing was and is of vital consequence. Pursuant to Federal statutes involving elections, States were required to certify their electoral votes on or prior to December 13, 1976. In order to meet that deadline, plaintiffs simultaneously filed an Order to Show Cause (24a) requesting a temporary restraining Order *pendente lite*. This had the effect of bringing on for immediate argument the procedural and substantive issues involved in this important litigation.

The plaintiffs, in support of their application for a temporary restraining Order, submitted to the Court approximately 50 affidavits of various individuals, delineating specific acts of election fraud which plaintiffs contended demonstrated a *prima facie* showing of a tainted election. These affidavits were submitted to the Court in the nature of an offer of proof

to demonstrate to the District Court the bonafides of the action in chief as well as the application for a restraining Order.

On December 1, 1976, Judge Mishler heard oral argument on behalf of the parties. The State Board of Elections was represented by special counsel, the New York City Board of Elections was represented by the Corporation Counsel of the City of New York, and the Secretary of State and the Governor of New York State were represented by the Attorney General of the State of New York. Judge Mishler, *sua sponte* directed all counsel to appear before him again on December 2, 1976 at which time he heard additional argument.

The defendants, in the interim, served and filed Motions to dismiss the complaint (15a et. seq.). At the second argument Judge Mishler had before him the Complaint, Petition for a Temporary Restraining Order and the Motions to dismiss the complaint. The Court advised all counsel that he was fully cognizant of the serious underlying substantive questions presented, as well as the procedural problems. He recognized the multiplicity of procedural problems which could be raised such as Standing, Proper Parties, etc. Judge Mishler further stated that justice would best be served by his holding in abeyance these procedural problems, and having the Court address the merits of the claim itself susceptible of appellate review. Accordingly, in a preliminary decision dated December 7, 1976 (60a) he directed that an evidentiary hearing commence on December 8, 1976. In that memorandum decision and Order he set forth the standards and criteria to be applied in the evidentiary hearing.

In essence, this appeal seeks to overturn the legal criteria formulated by the Court below. For good and practical reasons, these appellants do not seek by this appeal to decertify the election of James Earl Carter as President of the United States of America. The proof elicited at the evidentiary hearing demonstrated a pattern of voting fraud which had the direct and immediate effect of unconstitutionally

diluting votes properly and legally cast. In the words of Mr. Justice Powell in *Anderson v U.S.*, 417 U.S. 211, 227 (1974):

> "Every voter...whether he votes for a candidate with little chance of winning, or for one, with little chance of losing, has a right under the Constitution to have his vote fairly counted without its being distorted by fraudulently cast votes."

THE LEGAL ISSUES PRESENTED BY THIS APPEAL

The criteria evolved by Chief Judge Mishler are criteria of first impression, and being of singular and national importance, require Appellate review to assure constitutional protection in future elections.

The issues herein are not moot (Point I infra). Accordingly, this Appeal will be limited to two very specific areas of law: (I) mootness, (II) the clearly erroneous requirement of proving criminal intent in the Civil action.

THE LAW

POINT I

THE ISSUES HEREIN ARE NOT MOOT

It is clear that under the principles set forth by the United States Supreme Court, the case at bar is not moot. As is plainly indicated by the record of the case as fully developed below, the action presents both a substantial claim for damages and a viable and continuing issue of primary constitutional magnitude, which by its very nature is likely to reoccur, but evade review. Furthermore, because plaintiffs bring the action in their representative capacity, the issues pose a continuing controversy between the represented class and the defendants.

THE CONTROVERSY IS ONE THAT IS CAPABLE OF REPETITION, YET EVADING REVIEW, AND IS THEREFORE NOT MOOT.

Plaintiffs' claim (the dilution of their constitutional right to the franchise) stems from the Presidential elections of November 1976. In connection therewith, plaintiffs have charged defendants with unlawful and fraudulant conduct, and sought damages and a ruling that the election was conducted in violation of the Constitution. Neither plaintiffs, nor the class which plaintiffs represent, could vindicate their rights in a high court if the mootness doctrine were to be applied. Because of the time element inherent in the electoral processes, application of the mootness doctrine would systematically abort judicial review of the gravest violations of the most fundamental of rights — the right to vote. The Supreme Court does not permit such a result and has therefore propounded the principle that a case is not moot if the problem is "capable of repetition yet evading review." (See, *Southern Pacific Terminal v ICC*, 219 U.S. 498, (1911) (ICC rate making); *U.S. v W.T. Grant*, 345 U.S. 629 (1953) (interlocking directorate); *Carroll v President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (right to congregate); *Roe v Wade*, 410 U.S. 113 (1973) (abortion); *Doe v Bolton*, 410 U.S. 179 (1973) (abortion); *SuperTire Engineering Co. v McCorkle*, 416 U.S. 115 (1973) (strike); *Frost v Weinberger*, 515 F. 2d 57 (2nd Cir. 1975), cert den. — U.S. —, (social security benefits); *Andujar v Weinberger*, 69 F.R.D. 690 (1976) (social security benefits); *Moore v Ogilvie*, 394 U.S. 814 (1969) (election).

It is important to note that the case to first coin this oft-cited principle, *Southern Pacific Terminal v ICC, supra*, carved this exception to the mootness doctrine in part because the controversy therein concerned interests of a public character. Plaintiffs there had challenged the legality of an ICC order prohibiting the granting of a rate preference. By the time the case reached the Supreme Court for review, the ICC order had terminated.

Similarly, in *U.S. v Grant, supra*, the Court held as not moot a suit to enjoin an interlocking directorate which had terminated by the resignation of the defendant from certain corporate boards, before the appeal. The basis of the Court's decision was that the defendant was free to resume his conduct "(and there was) a public interest in having the legality of the practices settled." Id. at 62.

The electoral processes are more in the public weal than the existence of an interlocking directorate and are exemplary of the *Southern Pacific Terminal* rule. Therefore the Court has time and again refused to declare election cases moot. To deprive a plaintiff of a remedy because an election is over would be to invite an infinite and irremediable cycle of future abuses and invocations of the mootness doctrine. (See, *Moore v Ogilvie*, 394 U.S. 814, 816 (1969); *Dunn v Blumstein*, 405 U.S. 330, 332 n. 2 (1972); *Rosario v Rockefeller*, 410 U.S. 752, 756 n. 5 (1974); *American Party v White*, 415 U.S. 767, 770 n. 1 (1974); *Salera and the U.S. Labor Party v Tucker*, 399 F. Supp. 1258, aff'd — U.S. —, 96 S. Ct. 1451 (1976), *Fishman v Schaffer*, 50 L. Ed. 2d 56 (1976). A typical expression of the doctrine as applied to election cases may be found in *Storer v Brown*, 415 U.S. 724, 737 n. 8 (1974):

> "The election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issue properly presented and their effects...will persist...(T)his is therefore a case where the controversy is 'capable of repetition yet evading review.'"

The case at bar, evolving from, and directly related to, the electoral processes, is therefore clearly situated within the parameters of the *Southern Pacific Terminal* rule.

The above cited cases concern challenges to allegedly unconstitutional statutes, or orders; the case at bar is a challenge to a court evolved standard, which under the doctrine of *stare decisis* is in *pari causa*. If this rule of law is permitted to stand, it constitutes an open invitation to the repetition of such activities as alleged herein; or in more mundane terms will constitute a "license to steal elections."

The burden is on the *defendants* to show that it is "absolutely clear that the allegedly wrongful behavior could not

reasonably be expected to reoccur." *U.S. v Concentrated Phosphate Export Association* 393 U.S. 199, 203 (1968); *U.S. v W.T. Grant, supra*, at 633. (See also, *Securities and Exchange Commission v Medical Committee for Human Rights*, 404 U.S. 403 (1971); *Grey v Sanders*, 372 U.S. 368 (1963); *Frost v Weinberger, supra*; *Andujar v Weinberger, supra*. The latter two cases involve allegedly faulty methods of paying out social security benefits, which methods are not compelled by law.

Moreover, under the above cited cases, the law is clear that the voluntary discontinuance of the challenged conduct does not moot the case, unless defendants demonstrate that "there is no reasonable expectation that the wrong will be repeated." *U.S. v W.T. Grant, supra*, at 633, quoting *U.S. v Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945). *It is the "mere possibility (of recurrent violations that) serves to keep the case alive."* Id.

There is every reason to expect that the American electorate will be subjected to the same dilution of their right to vote in succeeding elections (federal, state, or local) unless an *enforceable* remedy is provided.

THIS ACTION PRESENTS A CLASS WITH A CONCRETE CONTROVERSY

In the case at bar, it cannot be overstressed that the claims as they relate to the named plaintiffs are viable and in all likelihood these same individuals, at the next election, will be forced to again seek judicial relief if none be forthcoming herein. Already, plaintiff Lyndon H. LaRouche has declared his presidential candidacy for the U.S. Labor Party in the next national elections.

However, assuming *arguendo* that the interests of the other individual plaintiffs be deemed extinguished at this time, the *Southern Pacific Terminal* rule operates to save the case from mootness. As a class action election suit, this case

presents the classic features for the operation of the rule. Where the interests of the named plaintiff are extinguished, but the class he represents are not, the court permits the named plaintiff to continue his representation in order to insure that the repeated conduct of the defendant does not evade review. *Sosna v Iowa*, 419 U.S. 393 (1975); *Gerstein v Pugh*, 420 U.S. 103, 110 n. 11; *Richardson v Ramerez*, 418 U.S. 24 (1974); *Goosby v Osser*, 409 U.S. 512; *Brockington v Rhodes*, 396 U.S. 41; *Roe v Wade, supra*. Thus the existence of a class action removes the necessity that there be a "reasonable expectation that the same complaining party...be subject to the same action again." *Weinstein v Bradford*, 423 U.S. 147 (1975) *1*

The fact that this case was dismissed before any application could be made for certification for class action status does not detract from the applicability of the *Southern Pacific Terminal* rule. The case was pleaded as a class action (32a) and the pleadings are at least a *prima facie* indication that it was properly so pleaded, in the absence of a ruling to the contrary.

The Second Circuit has applied the *Sosna* class action rule, whereby the class assumes a legal status separate from the interest of the named plaintiffs in order to avoid class action claims from being mooted, even where the classes have not yet been certified. *Andujar v Weinberger, supra*; *Frost v Weinberger, supra*. In fact, the Supreme Court in *Gerstein v Pugh, supra*, stated that the certification of the class is not required where circumstances, including those of time, do not permit.

The lack of necessity for certification is especially true in election cases where the court has noted the importance of

1 In any event, the plaintiffs at bar represent the full spectrum of interested or entitled parties, i.e.: Donohue, Weissman, Bramwell, Stewart sued as private citizens; Vanasco, Long and LaRouche as candidates on the ballot; Rockland County Conservative Party as a partisan political club; the Labor Party as an official political party sponsoring a candidate for president (LaRouche) and entitled to election funds under the Federal Election Campaign Act. Even if the interests of one or more of the individuals is deemed to be moot, there are remaining plaintiffs individually, and as a class, who are likely to be subject again to the same action.

the issues to all the voters and candidates and has reviewed the constitutional claims even after the election has taken place, and without reference to the absence of a certified class action. *American Party v White, supra; Storer v Brown, supra*; *Moore v Ogilvie, supra*; *Dunn v Blumstein, supra*.

Thus, the fact that the instant action was commenced as a class action, even though not so certified, renders it incapable of becoming moot, even were it not the case, *arguendo*, that the named plaintiffs would be injured similarly in the future.

In reality the class alluded to in *Anderson v U.S., supra*, consists of one hundred million voters. The rule of law enunciated by the trial court, which is the subject of this appeal, is a rule of law affecting the hundred million voters in this country. Therefore, given the expectation of recurring and allegedly unconstitutional conduct, it must be said that, as to the class, there exists a concrete controversy capable of repetition yet evading review.

Plaintiffs emphasize, however, that they, as well as the entire American electorate, will be injured in the future, as in the past, unless their rights are upheld by this Court, since their rights are subsumed within the rights of "every voter" referred to by Mr. Justice Powell in *Anderson, supra*.

THE EXISTENCE OF A BONA FIDE CLAIM FOR DAMAGES IS A LIVE ISSUE AND PREVENTS THE CASE FROM BEING MOOT

The Court below has implied that plaintiffs have stated a non-frivolous claim for monetary damages under 28 U.S.C. 1331 (a). See Opinion of December 7, 1976 (73a). The law of this Circuit and as set forth by the Supreme Court is that even when an action for declaratory and injunctive relief has become moot, a claim for monetary relief continues to be viable. *Bond v Floyd*, 385 U.S. 116, 128 n. 4 (1966); *Powell v*

McCormick, 395 U.S. 486 (1969); *McCabe v Nassau County*, 453 F. 2d 698 (2d Cir. 1971); *Winters v Miller*, 306 F. Supp. 1158 (1969); *Ashby v Weinberger*, 402 F. Supp. 1203 (1975).

In *McCabe v Nassau County, supra*, this court held that where monetary damages are timely included in the initial Complaint, and the equitable prayer for relief becomes moot, the claim for damages survives in the Federal Court. In *Powell v McCormick, supra*, petitioner Powell was duly elected to serve in the 90th Congress, House of Representatives. However, he was denied his seat by a resolution of the House. Powell sued for injunctive and declaratory relief and mandamus, charging violations of the Constitution. He additionally sued for the salary denied to him. By the time the case reached the Appellate stage, the 90th Congress had ended. Nevertheless, the Court said that the case was not moot because the claim for back pay remained a viable issue. Furthermore, the Court said, at p. 498-99:

> "Petitioner was denied salary due to an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties. Declaratory relief has been requested....A Court may grant declaratory relief even though it chooses not to issue an injunction or mandamus."

Certainly the alleged fraudulent conduct of the presidential election is an issue of great constitutional and public import, and presents a viable claim under any circumstance, in addition to the direct damages sustained by the plaintiffs at bar.

POINT II

IN A PROCEEDING BROUGHT UNDER THE CIVIL PORTIONS OF THE CIVIL RIGHTS ACT OF 1871 (42 U.S.C. 1983 AND 1985): IT IS A CLEAR ERROR TO APPLY CRIMINAL LAW STANDARDS. IN THIS REGARD THE TRIAL COURT COMMITTED CLEAR ERROR.

The trial Court focused on this issue in the following language:

> "A party contesting a Presidential election carries a heavy burden. Not to put too fine a point on it, this standard implies conduct of a most egregious nature, *approximating criminal activity*." (Italics added) (69a)

The trial Court reached the foregoing conclusion from two erroneous premises.

1 Unless one is attacking a statute per se, in contradistinction to improper application of a statute, it becomes necessary to demonstrate improper intent by those bodies or individuals whose legal obligation it is to enforce the statute.

2 Mere proof of incompetence or negligence by a body or individual applying the statute is insufficient to sustain the burden of one seeking to enforce his constitutional right in an election case, rather, the plaintiffs must demonstrate *mens rea*.

The Court below in its December 7th opinion set forth the following standards of proof:

> "Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents *intentional* or *purposeful* discrimination. (Citations omitted)." (67a) (Italics added).

* * *

"Purposeful deprivation of the right to vote will not be assumed merely because there is evidence that election officials acted incompetently or negligently and, as a result, persons not properly registered were permitted to vote. Rather *intentional* acts must be proven..." (67a) (Italics added)

The trial Court held that the standard of proof imposed on the plaintiffs was a showing of:

"Conduct of a most egregous nature, approximating *criminal activity*" (69a) (Italics added)

Notwithstanding the fact that the Court below announced the foregoing standard only in terms of plaintiffs' request for a new election, it also applied that standard equally to plaintiffs injunctive, declaratory and monetary prayers for relief. Upon the Court's finding that the plaintiffs failed to meet this standard of proof, the complaint was dismissed (84a).

It is submitted that in requiring proof of *intentional*, indeed *quasi-criminal* acts, the trial court committed clear error. The standards evolved by the trial court create an onerous burden of proof which is not proper in a *civil* action brought pursuant to 42 U.S.C. 1983 and 1985 (3), which action seeks to protect a voter's first amendment rights to an undiluted vote in an election.

THE IMPOSITION OF A QUASI-CRIMINAL STANDARD OF PROOF IN A CIVIL RIGHTS ACTION, UNDER THE CIVIL ASPECTS OF THE CIVIL RIGHTS LAW, IN CONTRADISTINCTION TO THE CRIMINAL ASPECTS THEREOF, INVOLVING VOTER RIGHTS, PRESENTS A NEW, UNIQUE AND ONEROUS REQUIREMENT.

The Court below in the December 7 opinion apparently misapplied the distinction between the civil and criminal

sections of the Civil Rights Act of 1871. The Supreme Court of the United States has emphasized that this is not to be done. In *Monroe v Pape* 365 U.S. 167, 187 (1961) the Supreme Court drew the following distinction:

"In the *Screws* case, we dealt with a statute that imposed criminal penalties for acts 'wilfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right'. 325 U.S. at 103. We do not think that gloss should be placed on Section 1979 which we have here. The word 'wilfully' does not appear in Section 1979. Moreover, Section 1979 provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against a background of tort liability that makes a man responsible for the natural consequences of his actions." *2*

Monroe v Pape, supra, renders inapposite Judge Mishler's reliance on *Swain v State of Alabama*, 380 U.S. 202; *Oyler v Boles*, 368 U.S. 448; *United States v Price*, 383 U.S. 787; *United States v Guest*, 383 U.S. 745; *Powell v Power*, 436 Fed 2d 84; and *Snowden v Hughes*, 321 U.S. 1 (67a).

Swain v Alabama, supra, was a criminal case involving alleged exclusion of black jurors. Not only was the intent standard stated in a criminal context, it was mere dicta, since the Supreme Court held that there was neither exclusion nor token inclusion of black jurors. c.f. 380 U.S. at 206 and 227.

Oyler v Boles, supra, likewise arose in a criminal context, and involved alleged selective application of an habitual offender law. Claims of selective prosecution fall into an area of quasi-judicial immunity and are totally unlike claims of deprivation of voting rights. See *Imbler v Pachtman*, — U.S. —; 96 S. Ct. 984 (1976). Furthermore, the intent language in *Oyler* was dicta, since the Supreme Court found that there

2 The Sect. 1979 referred to in *Monroe v Pape* is 42 USC 1983 (under which this case was brought). 1979 is the numbering of the Revised Statutes.

was a waiver of rights by the represented criminal defendant in that case, 368 U.S. at 453.

United States v Guest, supra, and *United States v Price, supra*, were criminal prosecutions arising out of the murder of civil rights workers in the South, and were precisely the type of cases, such as *Screws*, which the Supreme Court distinguished from civil actions (c.f. *Monroe v Pape, supra*).

Powell v Power, supra, relied upon *Snowden v Hughes, supra*. It is submitted that although the *Snowden* case was not mentioned in *Monroe v Pape, Monroe* had the effect of limiting the *Snowden* intent requirement to equal protection claims. See *Whirl v Kern* 407 F 2d 781, cert. den 396 U.S. 901 (1962); *Cohen v Norris*, 300 F 2d 24 (9 Cir. 1962); *Jenkins v Averett*, 424 F 2d 1228 (4 Cir 1970); *Batista v Weir*, 340 F 2d 74 (3Cir 1965); *Roberts v Williams*, 456 F 2d 819, cert. den. 404 U.S. 866 (1971); *Selico v Jackson*, 201 Fed. Supp. 475, 477 (196 2); *Roberts v Trapnell*, 213 F. Supp. 49, 50-51 (1962); *Johnson* v Crumlish, 224 F. Supp. 22, 25; and see Antieau *Federal Civil Rights Acts*, Sect. 83, notes 6 and 7. However, even if this were not the case, the intent requirement of *Snowden* was never applied to cases involving electoral rights, even in the early days of hostility towards the Civil Rights Act:

> "In the voting rights area, however, purposive intent has *never* been required. Historically, the civil action for damages based upon the deprivation of voting rights was one of the first type of cases to utilize the remedy afforded by Section 1983." The Evolution of the State of Mind Requirement of Section 1983; 47 *Tulane Law Review*, 870, 872 (1973) (Italics added).

That the foregoing analysis of the *Tulane Law Review* article is, indeed, correct is shown by the Federal cases which specifically hold that intent is not a required element of proof in electoral rights cases which span the entire 20th Century.

> "In cases of this character...it (is) not necessary that the plaintiff should allege that the defendant, in rejecting his vote, acted either maliciously or intentionally wrongful. The statute under which the plaintiff proceeded does not so require." *Brickhouse v Brooks*, 165 F. 534, 543 (1908). See also *Andersen v Meyers*, 182 F. 223, aff'd 238 U.S. 368 (1915).

The more recent cases have granted relief even where a positive finding has been made that criminal intent was absent, e.g., *Urey v Santee*, 303 F. Supp. 119, 123 (Finding of Fact number 14, at page 126) (Conclusion of Law number 5) (1969); *U.S. v Post*, 297 F. Supp. 46, 49 and 50 (Findings of fact numbers 21 and 31) (1969).

The New York State Court of Appeals in *Ippolito v Powers*, 22 NY 2d 594 held that relief could be granted "without evidence of fraud or other intentional conduct" in an election case. The Federal Courts have since adopted this rule, *Lehner v O'Rourke*, 339 F. Supp. 309, 314 (SDNY 1971). It is quite apparent that the trial court at bar predicated its holding on inapplicable cases, all the while ignoring the better and more persuasive cases in the relevant area of electoral rights.

In support of the proposition that plaintiffs may not demonstrate "purposeful deprivation of the right to vote" by a demonstration that election officials acted "incompetently or negligently", Judge Mishler relied on three cases which, it is respectfully urged, are inapposite. *Swain v State of Alabama, supra*; *Smith v State of Texas*, 311 U.S. 128, and *Washington v Davis*, 96 S. Ct. 2040 (67a).

Swain v Alabama, supra, as is demonstrated *supra*, was a criminal case totally inapposite to actions brought under the civil side of the Civil Rights Act.

Smith v Texas, supra, upon which *Swain* is bottomed, arose out of a criminal prosecution wherein there was alleged racial discrimination in jury composition. Remarkably, the only reference to intent in *Smith* is to the effect that intent is not a requirement of proof, 311 U.S. at 132. Thus, the Court below doubly erred in relying upon *Smith v Texas*.

The Court below cited *Washington v Davis, supra*, (67a), without discussion. Because of its recentness, and its notoriety, this case deserves fuller discussion. Several popular accounts would have it that *Washington v Davis* represents a re-introduction of an intent standard into the civil rights act. This is simply not so and certainly not correct in terms of the quasi-criminal intent mandated by Judge Mishler.

Washington concerned tests given to applicants for employment as police officers. The Court held that these tests were not arbitrary, but "reasonably and directly related to the requirements of the police" 348 F. Supp. 15 at 17 (1972). (This citation is the District Court citation.) A greater percentage of black applicants failed the tests than did white applicants. Since, at the time, Title VII of the Civil Rights Act of 1964 did not apply to civil service positions, the plaintiffs sought to have the court apply Title VII requirements (that employment tests be not only "job related" but also "validated". *Griggs v Duke Power*, 401 U.S. 424 (1971), under 42 U.S.C. 1981. This the Court declined to do. The holding of *Washington* does not apply to the case at bar for several reasons. Initially, *Washington* is itself in the nature of dicta, since Title VII as amended in 1972 now covers police force applicants. See 42 U.S.C. 2000e (a). As Mr. Justice Stevens, who joined in the main opinion and also wrote a concurring opinion, noted, the holding was limited to Section 1981. 48 Law Ed. 2d at 616. The case at bar is a Section 1983 case:

> "It is unrealistic...to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker." 48 Law Edition 2d 615. See also *Armstrong v Brennan*, 539 F. 2d 625, 633-4 (7th Circuit, 1976).

Finally, *Washington* was an equal protection case, and so arguably subject to the doctrine of *Snowden v Hughes, supra*. The case at bar is a voting rights case, and is thus totally outside of the doctrine of those cases which require intent, e.g., *Snowden v Hughes*.

The United States Supreme Court has recently demonstrated that it recognized this distinction, and the primacy of electoral rights. As Mr. Justice Powell wrote in *Anderson v U.S., supra*, a criminal case with facts quite similar to those at bar:

> "Every voter...whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right, under the constitution, to have his vote fairly counted without it being distorted by fraudulently cast votes." 417 U.S. at 227.

In its most recent pronouncement concerning 42 U.S.C. 1983, the statute under which the case at bar is bottomed, as opposed to Section 1981, which was before the Court in *Washington v Davis, supra*, the Court specifically negated any quasi-criminal intent requirement such as that imposed by Judge Mishler in this case:

> "An act violating...constitutional rights can no more be justified by ignorance or disregard of settled, indisputable law...than by the presence of actual malice...(defendant is) not immune if he knows, or reasonably should have known, that the action he took...would violate the constitutional rights..." *Wood v Strickland*, 420 U.S. 308, 321-322 (1975).

It surely passes belif that *Wood* would be overruled *sub-silentio* by *Washington*, within one year, in a case involving an entirely separate statute. This is especially so in light of the fact that Mr. Justice White wrote both opinions for the Court. Yet, the Court below at bar, in relying upon *Washington* and not discussing *Wood*, apparently so believed. This belief, it is contended, is clear error.

Pragmatically, Judge Mishler has created a standard which is not only legally not required, but is additionally *impossible of fulfillment*. Given the anatomy of an election fraud, and more particularly the fraud demonstrated in the

case at bar, one notes that it is not the election official who walks into the election booth and casts improper or fraudulent ballots. In the case at bar, some 24 photographs were introduced into evidence (exhibits 9 through 25 and 28 through 38). These photographs were of abandoned buildings in the South Bronx and Buffalo and empty lots in the South Bronx. These buildings were correlated with computer printouts from the Board of Elections (exhibit 27 in evidence). Essentially, the factual demonstration on the trial was that persons unknown registered with the Board of Elections, giving as their legal addresses premises which turned out to be the empty lots and abandoned buildings shown on the photographs. These same persons were later recorded as having voted. Clearly, plaintiff at bar presented no proof that any election official prepared false registration cards, or voted improperly by giving as their address these abandoned buildings or empty lots.

Betty Dolen, the executive director of the New York City Board of Elections, and a co-defendant in this action, testified (32a):

"Q. How many mail registrations did the New York City Board of Elections receive up to and including November 2, 1976?

A. Up to and including October 4th and postmarked October 4th, I am proud to say, New York City brought in 468, 586 mail registrations."

The election law of the State of New York, Section 153 (9), provides that the County Board of Elections, when it is not satisfied from an examination of an application for registration, or after its initial inquiry, that the applicant is entitled to such registration, may order an investigation, through any officer or employee of the State or County Board of Elections, police officer, sheriff or deputy sheriff" (which Section the Court was asked to take judicial notice of (35a). Mrs. Dolen testified(33a):

"A. After they were clocked in at the general office of the Board of Elections, they were then sent into boroughs. They were also put into alphabetical order by boroughs. Then sent to the— We made an IBM print-out for our own office use by county, by week of the application that came in through the mail."

* * *

Q. How long after a particular application was processed was it that it got onto a computer?

A. The same day. They were closed, divided by borough and alphabetized. (33a)

Q. Do you have 468, 586 names on computers?

A. We have, I would say, about 375,000 names on computers." (33a)

* * *

Q. *Mrs. Dolan, what if anything was built into your system to determine whether a person registered more than once?*

A. When the card — the buff card was put in a binder, if we saw another card with the same name, same birth date, same address, we didn't put the new one in. We just put that aside.

Q. Who put them in the binders at Varick Street?

A. Each borough.

Q. When you say we, you are referring to the —

A. The entire borough, the entire City of New York.

The Court: When you ask what is built into the system, I must note the observation of the Court. That sets out the pattern of the election process designed at least to safeguard against fraud and irregularity. I said before I consider an election an adversary proceeding. The statute provides in the State Constitution right through the legislative enactment and to the election law, that the two parties that received the highest votes in the last election — *it usually means the Democrats and the Republicans* — have equal representation on the State Board of Elections, on the City Board of Election, down to the inspectors of the election. Now, it may be that the inspectors haven't been doing their job. At least the system is designed to safeguard against fraud and irregularities. Mind you, the election law is so specific to say that the election inspectors are supposed to compare the signatures, placing a hand over the signature on the above card first, and announce in public that so and so in voting." (34, 35a).

It was at that point that trial counsel for plaintiffs, Mr. Fetell, requested the Court to take judicial notice of Section 153 of the election law which puts the burden not on poll watchers, but on the board of elections and makes available to it all of the investigative agencies of this State. As counsel pointed out to the Court (35a) "Apparently, the legislature in their wisdom made the County Board of Election the policeman over it and that is why I'm examining Ms. Dolan now." Further pertinent testimony is to be found at 36a:

"Q. Ms. Dolan once these registrations were put into the computer did anybody in the Board of Elections get a read-out to check the double registrations?

A. I got a copy of the — this is not the checking of the registration.

Q. The question is, in its entirety, did anybody get a read-out for the — alphabetical read-out — to check for double registrations at that level?

A. No, not to check for double registrations.

Q. Was there anything — when this system was implemented by the Board of Elections, Was anything done to spot check for the possibility of registering from tombstones to empty lots to empty buildings?

A. No, there is an affidavit on the application and when it is signed — that affidavit must be signed by the applicant. And when that application comes in with the signature on the affidavit, it is presumed what the person filled out it is the truth and also there is a class E felony on the other side which charges in the event it is proven you are not telling the truth, you are subject to a class E felony."

Further along these lines, Mrs. Dolan testified (52a):

The Witness: Well perhaps I am mistaken, but I don't think people go in and vote twice.

Q. You would believe that was a crime wouldn't you?

A. That would be a crime, I would say I don't condone it.

Q. In your capacity with the Board of Elections of the City of New York, do you persume that there is no fraud among voters?

A. Well, I wish we had a utopia of that kind.

Q. Do you recognize that it is a part of your responsibility and the responsibility of the Board of Elections to look for irregularities and report them to the proper authorities, if found?

A. No, we don't look for irregularities, if they are called to our attention we check them out." (Italics added).

* * *

As a matter of law, what difference does it make whether an election official commits fraud directly, or through negligence or condonation permits fraud to be committed by private or partisan groups? *If an election is tainted it is tainted regardless how the taint comes about.*

Mrs. Dolan tesified that she was part of a major program of registration (28a) that there were over 400,000 registrations by mail and that some 50,000 persons voted by "A ballot" (30a), i.e., affidavits in lieu of a registration card, and that of these 50,000 persons 40,000 of them were rejected, all of which demonstrated the mass confusion and inefficiency which pervaded this presidential election. Employees of the board of election came from the "County organization", i.e., the Democratic County organization (31a) and that having been sent down by the party organization these clerks were prima facie qualified. On the last day for registration the Board of Elections received "100,000 applications" (34a) which were sent out to borough offices without a list being made, from which list double registration could be determined.

There were incidents where individuals representing community groups or themselves brought in as many as 10,000 new voter registration cards into the election offices at one time (44a).

> The Court: So individuals who were interested in the outcome of the elections brought in 5,000 or 10,000 applications?
>
> The Witness: That is right.

The testimony of Mrs. Dolan is reproduced in its entirely in the appendix (25a, et. seq.).

In terms of protecting voters' rights, in the language of Mr. Justice Powell in *Anderson v U.S., supra,* does it really matter whether votes are diluted or fraudulently cast by reason of negligence, or by reason of fraud committed by an election official, or by other voters? Is not the assurance of a

free, unfettered and constitutional election the goal mandated by our Federal Constitution?

Judge Mishler cited no legal authority for the proposition that in any civil rights case wherein a voter seeks to enforce his constitutional right to a clean election, he is precluded from demonstrating negligence, etc., by election officials and must prove criminal or quasi-criminal fraud or intent. In effect, Judge Mishler has created a rule of law which requires that in order to upset a fraudulent election, the plaintiff must bring in proof showing the hand of an election official "in the cookie jar." Such a rule of law is applicable where the remedy sought is *in personam,* in a criminal proceeding to punish the wrongdoer; such a rule of law is not applicable where the issue before the Court is in effect *in rem,* i.e., addressed to the tainted election. A citizen concerned with clean elections cannot have his constitutional rights assuaged by an election official spending time in jail; the remedy can only be voiding that which was tainted. A valid analogy and argument made to Judge Mishler was the following: Assuming a citizen learns that milk containing botulism is about to be delivered to school children and seeks injunctive relief to compel school officials or state officials to withdraw the tainted milk from the market, is it necessary to show how the milk became tainted, is it necessary to demonstrate that the officials sought to be enjoined are the ones who put the botulism in the milk? This question is clearly rhetorical and the answer is self-evident. If such be the case, in what respect does a tainted election differ from tainted milk, especially where the election is one involving election to the highest office in this country?

Good faith on the part of election officials cannot and is not a bar to injunctive relief. *Demkowicz v Endry,* 411 F. Supp. 1184, 1191 (USDC, SD Ohio) (1975):

> "Plaintiff insists that the good faith and reasonable belief defense enunciated in *Wood v Strickland* and like cases may not serve to bar any form of equitable relief. There would be, of course, no purpose in permitting such a

defense to bar prospective injunctive relief and there appears to be general agreement that the defense is not available in such a case."

Conclusion

The Judgment of Dismissal Should Be Modified.

Respectfully submitted,

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and
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Attorneys for Plaintiffs-Appellants

LESTER E. FETELL, ESQ.
DAVID S. HELLER, ESQ.
CARREN KLEINMAN, ESQ.
On the brief.

Order

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of May, one thousand nine hundred and seventy-seven.

Present:

STERRY R. WATERMAN,

MURRAY I. GURFEIN,
Circuit Judges.

M. JOSEPH BLUMENFELD, District Judge*
Circuit Judges.

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,
Plaintiffs-Appellants,

-against-

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN, AND HUGH CAREY,
Defendants-Appellees.

76-7601

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed.

Sterry R. Waterman
STERRY R. WATERMAN, Circuit Judge

Murray I. Gurfein
MURRAY I. GURFEIN, Circuit Judge

M. Joseph Blumenfeld
M. JOSEPH BLUMENFELD, District Judge*

*U.S. District Judge for the District of Connecticut, sitting by designation.

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77- 77-1911

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Appellants,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN, AND HUGH CAREY,

Appellees.

BRIEF OF APPELLEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Appellants,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN, AND HUGH CAREY,

Appellees.

Brief of Appellee in Opposition To Petition for a Writ of Certiorari

---

STATEMENT

Appellee, Board of Elections of the State of New York submits this brief in opposition to appellants' petition for a writ of certiorari, on the ground that even though the courts below did not utilize the standard which is the subject of the appellants' petition when they dismissed the appellants' complaint, the courts below correctly required the appellants to present proof of

intentional actions in order to state a claim actionable under either 42 U.S.C. 1983 or 42 U.S.C. 1985(3), and accordingly the appellants' petition for a writ of certiorari should be denied.

STATUTES INVOLVED

Title 42 U.S.C. 1983

> "§1983. Civil action for deprivation of rights.
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 U.S.C. 1985(3)

> "§1985 Conspiracy to interfere with civil rights — Preventing officers from performing duties.
>
> • • •
>
> "Depriving persons of rights or privileges
> "(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF CASE

The appellants commenced an action in which they charged the appellees with fraudulent acts and irregular procedures in the conduct of voter registration in 1976 and in the conduct of the subsequent general Presidential election held in November 1976. The appellants alleged that numerous illegal ballots were cast on election day and that the chaos and confusion which existed at the polling places led to further illegal acts. The appellants sought to (1) enjoin the Secretary of the State of New York and the Governor from certifying the Democratic Presidential electors; (2) declare the Presidential election conducted in New York on November 2, 1976, null and void; (3) have the courts direct that a new election be held.

All of the respondents moved to dismiss. The United States District Court for the Eastern District of New York denied the motions to dismiss even though it found that the complaint, as drawn, did not state a claim upon which relief could be granted (p. 69a of Appellants' Appendix). The District Court for the Eastern District of New York, rather than dismiss the complaint with leave to replead, granted the appellants an evidentiary hearing on their request for a preliminary injunction and the court granted the appellees permission to amend the pleadings to conform to the proof presented at the evidentiary hearing.

The District Court held that the appellants must allege and prove:

(1) that specific acts of fraud or other unlawful behavior were committed in the conduct of the election;

(2) the fraud or other unlawful behavior was committed with the intent or purpose of depriving qualified voters of their constitutionally protected right to vote ;
(3) the fraud or other unlawful behavior was committed by persons acting under the color of state law; and
(4) the fraud or other unlawful behavior changed the outcome of the election (p. 69a of Appellants' Appendix).

An evidentiary hearing was held on December 8 and 9, 1976. At the hearing the appellants attempted, through the use of statistical survey techniques, to prove that the November 2, 1976 Presidential election in New York was so permeated with fraud and procedural irregularities that the Presidential electors for President Ford were deprived of their victory. A random sample of 2434 voters uncovered 128 confirmed frauds and 305 unconfirmed frauds. These statistics projected out to a range of 138,027 (minimum) to 306,108 (maximum) irregular votes. The appellants admittedly had a "polling universe" restricted to urban areas in New York State and it was comprised of only 42% of the voter population of New York State. The court found that the appellant's own expert (Dr. George E. Bardwell) testified that the appropriate universe was the entire state (p. 83a of Appellants' Appendix).

The District Court (*Mishler,* C.J.) ruled against a preliminary injunction and held that the appellants had failed to prove (1) specific acts of fraud by persons acting under color of state law and (2) that the irregularities, if eliminated, would have changed the results of the election. The District Court dismissed the complaint.

The appellants sought a stay from the United States Court of Appeals for the Second Circuit, which was denied on December 13, 1976. The appellantes then sought to stay from this Court which was denied on December 27, 1976 (*Marshall,* J.)

Appellants appealed to the United States Court of Appeals for the Second Circuit. The judgment of the District Court was unanimously affirmed without opinion by the United States Court of Appeals for the Second Circuit on May 5, 1977 (p. 114a of Appellants' Appendix).

Appellants now seek a writ of certiorari.

OPINIONS BELOW

The United States District Court for the Eastern District of New York (*Mishler,* C.J.) denied the appellants' motion for a preliminary injunction. The District Court held that the appellants had failed to show that election practices in unsampled voted areas were similar to election practices in sampled areas. It was also held by the District Court that even if the voter sample was proper, the evidence of voting irregularities was susceptible of inferences other than fraud. Finally, it was held by the District Court that even if the court accepted the appellants' contention that 306,107 "fraudulent" votes were cast in New York's urban areas, as a matter of mathematics, the appellants failed to establish that the outcome of the election would have been different in the absence of fraud. There was no evidence of the partisan nature of the vote and even if the District Court generously conceded that 90% of the extrapolated fraudulent vote went to Jimmy Carter, it constituted 275,496 votes or less than the Carter margin of 288,767 votes in New York. In effect, the District Court held that the appellants failed to prove that specific acts of fraud were performed by persons acting under color of state law, or that the irregularities in the voting, if eliminated from the final tally, would have changed the result of the election.

The United States District Court for the Eastern District of New York denied the preliminary injunction and dismissed the complaint.

The United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court.

REASONS FOR DENYING CERTIORARI

A.

THE TRIAL COURT DID NOT UTILIZE THE STANDARD WHICH IS THE SUBJECT OF THE APPELLANTS' PETITION WHEN IT DISMISSED THE APPELLANTS' COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION.

The United States Court of District Court for the Eastern

District of New York (*Mishler*, C.J.) in its Memoranda of Decision and Order dated December 10, 1976 held that:

> "In sum, the plaintiffs, have *failed to prove that specific acts of fraud were performed by persons acting under color of state law or that the irregularities in the voting, if eliminated* from the *final tally, would have changed the result*. Accordingly, the court finds no likelihood that plaintiffs will prevail on the merits." (p. 84a of Appellants' Appendix). (emphasis added).

In the absence of findings that the appellees played an affirmative part in any fraudulent or illegal acts, or that the outcome of the election would have been different in the absence of fraud, the alleged causes of action under 42 U.S.C. §1983 were properly dismissed.

Section 1983 applies to persons who "under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." In the case of *Rizzo* v. *Goode*, 423 U.S. 362, (1976) this Court stated at page 370-371:

> ". . . the plain words of the statute impose liability — whether in the form or payment of redressive damage or being placed under an injunction — only for conduct which 'subjects or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws."

The *Rizzo* case was a class action for injunctive relief brought under 42 U.S.C. §1983 against the Mayor, City Managing Director and Police Commissioner of Philadelphia alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens. Although the District Court failed to find any affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by the defendants showing their authorization or approval of such conduct, it ordered that a review board procedure be implemented to handle citizen complaints. The United States Court of Appeals for the Third Circuit affirmed. This court, however, reversed and stated:

> "Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights securing under the Constituition. Under the well-established rule that federal judiciary powers may be exercised only on the basis of a Constitutional violation, . . . this case presented no occasion for the District Court to grant equitable relief against petitioners." (Id. at 377)

In the case at bar, the District Court, after an evidentiary hearing held on December 8 and 9, 1976 at which the Appellants were permitted to introduce testimony and exhibits of purported evidence of negligent action and acts of omission on the part of the appellees that allegedly violated the appellants' Constitutional rights, found that the appellants did not prove that the appellees had deprived the appellants of any Constitutional rights.

It should also be noted that since the District Court held that as a matter of mathematics the appellants' proof of election irregularities was insufficient to alter the outcome of the election, the criteria set forth in the Memorandum of Decision and Order of December 7, 1976 were never reached or applied by Chief Judge Mishler when he dismissed appellants' cause of action for injunctive relief. Thus, the issue of whether the District Court erred when it required proof of fraudulent intent is really a moot issue.

B.

THE DISTRICT COURT WAS CORRECT IN REQUIRING THE APPELLANTS TO PRESENT PROOF OF INTENTIONAL ACTIONS IN ORDER TO STATE A CLAIM ACTIONABLE UNDER EITHER §1983 OR §1985(3) OF TITLE 42 OF THE UNITED STATES CODE.

The District Court, in its Memorandum of Decision and Order dated December 7, 1976 set forth the requirement that the appellants must show intentional actions by the appellees to deprive the voters of the right to vote. The District Court stated as follows:

> "But before a federal court can responsibly order a new election, the claimants seeking this extraordinary relief must come forward with the most clear and convincing evidence

that state officials or persons acting under color of state law, *by intentionally depriving qualified voters of the right to vote,* altered the outcome of the election. A party contesting a Presidential election carries a heavy burden. Not to put too fine a point on it, this standard implies conduct of a most egregious nature, approximating criminal activity." (69a) (emphasis added)

(a)
Uneven or Erroneous Application of an Otherwise Valid Statute Constitutes a Denial of Equal Protection and Due Process Only if it Represents Intentional or Purposeful Discrimination.

Appellants alleged that the appellees condoned and permitted election irregularities with the result that unregistered persons were permitted to vote, thereby depriving those voters who were properly registered the equal protection and due process of law guaranteed by the First and Fourteenth Amendments to the United States Constitution.* In *Snowdon* v. *Hughes,* 321 U.S. 1 (1943) this Court addressed a similar claim that official action constituted a denial of the equal protection of the laws secured by the Fourteenth Amendment. This Court rejected the claim and stated:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, *it is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."* (*Id.* at 8)

Since *Snowden,* it is clear that a cause of action based upon the Equal Protection Clause of the Fourteenth Amendment requires proof of intent. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* _____U.S. _____, 97 S.Ct. 555 (1977). *Oyler* v. *Boles,* 368 U.S. 448 (1962) and *Powell* v. *Power,* 436 F. 2d 84 (2d Cir., 1970).

Further, the recent case of *Washington* v. *Davis,* 426 U.S. 229 (1976), indicates that this Court will require proof of intent to

*Plaintiffs' Complaint (11-12a)

establish causes of action based on other Constitutional provisions. In *Washington,* a test given to police recruits was challenged as racially discriminatory under the Due Process Clause of the Fifth Amendment. Although the lower courts failed to find any discriminatory purpose on the part of those who established the test, the test was nevertheless held unconstitutional because of its racially disproportionate impact. This Court, however, reversed and held that:

> "Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional *solely* because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose." (*Id.* at 230)

In stressing the importance of finding a purpose to discriminate, this Court also noted that the rule is the same in other contexts, citing *Wright* v. *Rockefeller,* 376 U.S. 52 (1964). In *Wright,* a New York Congressional apportionment statute was upheld against a claim that district lines had been racially gerrymandered since there was no proof of an invidious discriminatory purpose on the part of the New York Legislature.

Since *Washington,* this Court has also required proof of intent to state a cause of action under §1983 for a violation of the Eighth Amendment's prohibition against cruel and unusual punishments. See *Estelle* v. *Gamble,* 429 U.S. 97, (rehearing den. 97 S.Ct. 798). Thus, in requiring plaintiffs to provide proof of intentional acts, Chief Judge Mishler followed the standard set for Constitutional causes of action as enunciated in *Washington and Estelle.*

(b)
Not Every Election Irregularity Will Give Rise to an Equal Protection or Due Process Claim.

In *Powell* v. *Power,* 436 F. 2d 84 (2d Cir. 1970) the United States Court of Appeals for the Second Circuit addressed the issue of whether administrative infirmities in an election, in the absence of willful or knowing dilution by illegal voting, create a remedy in the federal courts. As in the instant case, the plaintiffs in *Powell* alleged that State officials permitted voting by persons

not qualified to vote under State law thereby diluting the votes of qualified voters, but they failed to allege that the dilution was willful or knowing.

In affirming the District Court's denial of relief under §1983, the Court said:

> "In the plaintiffs' view, two federal statutes comprehensively protect their ballots against dilution by illegal voting, whether or not the dilution was willful or knowing. It is appropriate to note at the outset that the plaintiffs do not claim any discrimination because of race. Thus, they face a considerable burden of persuasion in asserting so sweeping and novel a conception, one apparently never before asserted, as far as reported cases reveal. Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." (*Id.* at 86)

The *Powell* holding is directly on point to the instant case. Its rationale has been adopted by the Eighth Circuit in *Pettengill* v. *Putnam County R-1 School District, Unionville, Missouri,* 472 F. 2d 121 (8th Cir. 1973), the Seventh Circuit in *Bohus* v. *Board of Election Commissioners,* 447 F. 2d 821 (7th Cir., 1971) and by a district court in *Means* v. *Wilson,* 383 F. Supp. 378 (D.SD. 1974).

(c)
The District Court's Refusal to Invalidate the Election, in the Absence of Proof of Intentional Actions, Was Within Its Discretion as a Court of Equity

The traditional standard for reviewing a denial of equitable relief is whether a district court abused its discretion in denying the relief requested. *Brotherhood of Locomotive Engineers* v. *M-K-T-R Co.,* 363 U.S. 528, 535 (1960); *Williams* v. *Rhodes,* 393 U.S. 23, 65 (1968).

In the District Court, appellants requested equitable relief that was truly extraordinary in nature — the setting aside of the election of New York's forty-one Presidential Electors. Such an

action would have created a serious Constitutional issue as to the proper procedure to be followed under the Twelfth Amendment and might also have thrown the election of the new President into the House of Representatives.

In addition, setting aside the election would have had an even greater chaotic and disruptive effect on the electoral process if the court had both invalidated the results and ordered a new election. This is because New York State's electoral votes would have provided the margin of victory for either of the two major party Presidential candidates, and thus, New York State's voters would have had a role in the selection of the new President far exceeding in importance that consistent with the concept of "one man, one vote."

Accordingly, the District Court exercised great discretion when it balanced appellants' request for injunctive relief with the effects that the granting of such relief would have on the electoral process, and decided to require proof of intentional actions on the part of appellees as a precondition to issuing any order overturning the election.

(d)
In Order to Prove a Cause of Action Under 42 U.S.C. §1985(3), Intentional or Purposeful Discrimination Must Be Established.

Appellants also alleged a cause of action under 42 U.S.C. §1985(3). That section creates a cause of action where "two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . ." However, it is well-settled that in order to prove a cause of action under §1985(3), it is necessary to establish intentional or purposeful discrimination between classes or individuals. See *Griffin* v. *Breckenridge,* 403 U.S. 88 (1971); and *Robinson* v. *McCorkle,* 462 F. 2d 111 (3d Cir., 1972). Thus, the District Court correctly required proof of intent to establish a conspiracy cause of action under §1985(3).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

ed: Albany, New York
August 26, 1977

Respectfully submitted,

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